



(21,433.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 109.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY,  
APPELLANT,

vs.

FRANK P. STEARNS, AS MAYOR OF THE CITY OF  
SHAWNEE; A. D. MARTIN, AS CLERK OF THE CITY  
OF SHAWNEE; JOHN LAIN ET AL., MEMBERS OF THE  
CITY COUNCIL OF THE CITY OF SHAWNEE, ET AL

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1910.

Co. vs. Frank P. Stearns as Mayor et al. Citation and Acceptance of Service. Filed Nov. 7th, 1908. Harry L. Finley, Clerk.

## 3 UNITED STATES OF AMERICA,

*State of Oklahoma, Western District, ss:*

In the United States Circuit Court of the Western District of Oklahoma.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY, a Private Corporation, Plaintiff,

vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy and W. T. Love, Members of the City Council of the City of Shawnee, and the City of Shawnee, a Municipal Corporation, and the Newman Plumbing Company and Walter Newman, Defendants.

## Bill in Equity.

To the Honorable Circuit Judges of the Circuit Court of the United States in and for the Western District of the State of Oklahoma:

Your orator, The Shawnee Sewerage and Drainage Company, a private corporation, the petitioner herein, complaining of the said defendants herein and each of them, alleges and shows to your honors:

1st. That your petitioner is a private corporation, duly organized under the laws of the State, once Territory of Oklahoma, and has been such corporation at all the times hereinafter mentioned, and as such corporation, it has been engaged in the business of owning, constructing and operating a system of sewerage in the City of Shawnee, Pottawatomie County, Oklahoma, and has been engaged in such business at all the times hereinafter mentioned.

4 2nd. That the defendant, Frank Stearns, Mayor of the City of Shawnee, is the duly elected, qualified and acting mayor, and the defendant, A. D. Martin, the duly elected, qualified and acting Clerk of the City of Shawnee, state of Oklahoma; that the defendants, John Lain, M. B. Hairston, W. H. Parker, J. Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy and W. T. Love are members of the city council of the City of Shawnee.

3rd. That heretofore, to-wit; on the 22nd day of November 1901, the City of Shawnee, being as now a city of the first class, incorporated and organized under and by virtue of the laws of the Territory of Oklahoma, relating to the corporation of such cities, did by Ordinance numbered 228 grant to De Bruler-Newman & Co., their successors and assigns for and during a period of fifty years, the privi-

lige to build and maintain within the City of Shawnee, a system of sewerage, with the necessary branches, Y's, man-holes, flush tanks and other appurtenances essential to the construction and maintenance of such sewer system, for the supplying of business houses, and inhabitants, with a conduit to dispose of all waste water from the closets, urinaries, bath tubs, lavatories and for all other public and private purposes; the said ordinance among other things provided that the said grantees, the De Bruler Newman Company should enter into a bond in the sum of one thousand dollars (\$1000) to be approved by the council of the said city for the faithful performance of the duties and obligations imposed upon them by the said ordinance, and should commence the construction of the said sewer system on or before the 1st day of January, 1902, and that the said ordinance was duly approved by the mayor of the said city, and was published on the 21st day of November, 1901, in the Shawnee

Democrat, a daily newspaper of general circulation in the said 5 city and county, published in the said city.

A copy of said ordinance is hereto attached, marked "Exhibit A" for identification, and made a part hereof.

4th. That thereafter, to-wit; on or about the 28th day of February, 1902, the mayor and common council of the said City of Shawnee, for the said city, passed an ordinance numbered 241, by the terms and conditions of which they amended the said ordinance numbered 228 and provided therein that the said franchise should be granted to De Bruler-Newman & Co., and their successors and assigns, for the period of twenty-one years, and did in all things ratify and confirm the provisions of the former ordinance passed. A copy of the said ordinance is hereto attached marked "Exhibit B" and made a part hereof.

5th. That thereafter, to-wit on the 1st day of February 1902, the said De Bruler-Newman & Co., for a valuable consideration, assigned, transferred and set over to the Shawnee Sewerage & Drainage Company, all of its rights, privileges, immunities, property and interests in and to their system of sewerage granted to them under the provisions of the said ordinance above referred to, and all and every ordinance of the city of Shawnee, and that thereafter, to-wit; on the 26th day of February, 1902, the said defendant, the mayor and the city council of the City of Shawnee, did by ordinance numbered 242, transfer, ratify and confirm the transfer of the rights, privileges, titles, and immunities granted to the De Bruler-Newman Company by the said ordinance numbered 228, and as amended by ordinance numbered 241 of the city of Shawnee, from the said De Bruler-Newman & Co. to the Shawnee Sewerage & Drainage Company, and did thereby vest your orator with all the interests, titles, rights, privileges and immunities of the said franchise, for the building, con-

6 structing, erecting and maintaining of a system of sewers in the city of Shawnee, to the plaintiff in this suit, and did by the said ordinance, authorize and empower your orator to mortgage the said properties, rights and privileges to secure a sum not to exceed Twenty-five Thousand Dollars, and did in the said ordinance provide that the said city should have the option of buying the said

system at the exact cost of the construction of the said sewer or any extension thereof, from and after the expiration of fifteen years from the date of the passage of the said ordinance; a copy of the said ordinance is hereto attached, marked "Exhibit C" and made a part hereof.

6th. That by the terms of the said ordinance numbered 228, and other ordinances numbered 241 and 242, the said De Bruler-Newman & Co., their successors and assigns, your orator herein, contracted and agreed to allow the use of the said sewers for the city hall, jail, fire department and public watering troughs within the limits of the said system, free of charge, and the said city obligated and bound itself to furnish water to flush the said sewers, free of charge, when in the opinion of the said grantees and their assigns, your orator herein, and the city council, should deem it necessary.

7th. That on or about the 1st day of December, 1901, said De Bruler-Newman & Co., having heretofore given their bond in the sum of One Thousand Dollars (\$1000) as conditioned by the said ordinances and approved by the said city of Shawnee, did commence the construction of the said system of sewers, and did continue the said construction until the transfer as aforesaid, to the plaintiff in this action, and the said plaintiff did thereupon continue the construction and extended its mains and laterals over and throughout the limits of the said city, and did expend and invest in such exten-

7 sion, the total sum of Forty Thousand Dollars (\$40,000.), and did, pursuant to the ordinance numbered 242, issue its bonds and notes in the sum of Twenty-Five Thousand Dollars (\$25,000) payable twenty-one years from the date hereof, bearing six per cent. interest, and as security for the payment of the said bonds, did execute its mortgage upon all its properties and franchises, situated in the said city of Shawnee to the holder of the said notes and bonds, and did furnish to the said city and did allow to the said city, the use of the said sewer system free of charge for the city hall, jail, fire department and watering troughs within the limits of the said city, and did connect its said system with the said city hall, jail, fire department, and did perform its duties to the city in that it connected its system to six watering troughs which were erected by the said city, and did in all and every way comply with the conditions, duties and obligations imposed by the said ordinances, and is now and has been continuously since the said time, maintaining the said sewer system, and has met all the demands and necessities of the said city of Shawnee for sewerage purposes, and has in all respects carried out the terms and conditions of the said ordinances granting to it privileges, franchises and immunities as above stated, and has connected with the city hall, jail, fire department and public watering troughs until the 22nd day of December, 1906, at which time your orator sold and transferred its main line to the defendant.

8th. That the said plaintiff is the owner of the said property except the part thereof sold to the said defendant, which is hereinafter more fully described and set forth, of the value of Thirty Thousand Dollars (\$30,000.), on which it is regularly assessed and pays to the said city, to the said county and to the said state, its proper, just and

legal taxes upon its said properties, and all the said taxes imposed by the said city upon the said property upon the property owners 8 of the said city of Shawnee are extended to and charged against and collected from the said plaintiff's property, as your orator's interests appears from time to time and as assessed.

9th. That on or about the 1st day of December 1901, the city of Shawnee passed an ordinance providing that wherever such sewer system should be extended that all over ground closets should be declared a public nuisance, and requiring the property owners adjacent to such extension to connect with the said sewer system, the said ordinances being passed for the purpose of encouraging the building of the said sewer system by your orator herein; but that immediately after the investment of large sums of money in the construction of the said sewer system, the said city repealed the said ordinance, and has habitually and systematically discouraged, and by divers means attempted to impair the investment of your orator and to destroy its property, and to take the same without paying therefor any consideration, well knowing that your orator had invested large sums of money upon the construction and maintenance of the said system and well knowing that your orator had relied upon the privileges and immunities granted by the said ordinances in the making of the said investment, and that your orator while so relying, had made its investment as aforesaid, of Forty Thousand Dollars (\$40,000), and so constructed the said system of sewerage adequate to the needs and comfort and demands of the said city of Shawnee.

10th. That your orator has also issued its bonds and sold the same to divers and numerous innocent purchasers for value, the names of which owners being to your orator unknown, and did secure such bonds by a mortgage as by the said ordinance permitted.

9 11th. That on the 5th day of October, 1906, the mayor of the city of Shawnee in due and proper form issued a proclamation calling an election and submitting to the voters on the 6th day of November, 1906, the question of whether or not bonds should be issued in the sum of One Hundred Sixty-Five Thousand Dollars, (\$165,000), for the purpose of extending the water works system of the said city of Shawnee, and for constructing the said sewer system therein, and that on the said 6th day of November, 1906, the said bond issue was duly carried and your orator did commence an action in the district court of the said county and Territory of Oklahoma, to enjoin the said city from building, constructing and maintaining the said sewer system therein, without having first purchased your orator's sewer system, or compensating it therefor, and that a temporary injunction was issued against the said city, and that thereafter on the 22nd day of December, 1906, the said action was duly and regularly tried in the district court of the said county and state, and that a decree was rendered and given, adjudging and decreeing that your orator had a legal and valid franchise from the said city of Shawnee, and that your orator was authorized by the said franchise to carry on the business of operating the said system of sewerage in the said city of Shawnee, and by such fran-

chise that said city of Shawnee was excluded from constructing a competing sewer system, and that the operation and construction of this sewer by the said city in the immediate vicinity of your orator's sewer, would confiscate your orator's property, and would depreciate the value of the bonds thereon; and that your orator had an exclusive right against said City, that the mayor and councilmen of the said city of Shawnee were by the said decree enjoined from building and operating a sewer system in the vicinity of the plaintiff's system until after your orator's sewer should be 10 condemned or purchased by the said city; and that the said defendant was enjoined from building or from preventing your orator from connecting with any main sewer of the said defendant free of charge and to use the same by such connection with the district sewers and laterals belonging to your orator within the said city, on the date of the rendition of the said decree; a copy of the said decree is hereto attached, marked "Exhibit D" and made a part hereof, and a copy of the petitions filed therein except the exhibits as hereto attached, marked "Exhibit G" and made a part hereof and said exhibits are attached hereto as exhibits A. B. & C. respectively.

12th. That thereafter, to-wit, on or about the 3rd day of March, 1907, your orator entered into a contract with the defendant, the city of Shawnee, which contract provided that in consideration of the sum of Six Thousand, Nine Hundred Dollars (\$6,900.00) and all the stipulations set forth in the contract, that your orator sold and transferred to the said defendant all of its main line of sewer, beginning on the north bank of the Canadian River, in Section Thirty (30), Township Ten (10) Range four (4), East Indian Meridian and extending North to the corner of Seventh street and Oklahoma Avenue; running thence west on Seventh street to the corner of Philadelphia Avenue; thence north to the alley north of Main street on Philadelphia Avenue, and further providing that the defendant, the City of Shawnee, would recognize the rights of your orator to the said laterals, which were then laid in the said city and which were of the value of Thirty Thousand Dollars (\$30,000), and it further provided that at such time as the said city should be divided into sewer districts, for the purpose of laying and constructing laterals in the said districts, the said city would cause the 11 property of your orator to be appraised and the price of the same set forth, and that all lawful means to take up the said laterals and the price agreed upon to the abutting property, and would deliver the tax warrant unto your orator which would be in payment of the said laterals; a copy of the said contract is hereto attached, marked "Exhibit E" and made a part hereof.

13th. Your orator further alleges and says to your honors that they did on or about the 1st day of June, 1908, in order to comply with the terms of their contract above referred to, submit to the said defendants herein, a proposition offering to relay and lower all of the laterals owned by it, to the depth required by the plans and specifications of the city engineer, and under his direction and at the engineer's estimate of cost, in good workmanlike manner, if any of same were not of such depth, which offer was by the defendant re-

jected; a copy of the same is hereto attached, marked "Exhibit F" and made a part hereof.

14th. That on or about the — day of June 1908, the said defendants in disregard of the said judgment in favor of your orator, and against the said defendants and in disregard of the contract above referred to, did enter into a contract with the Newman Plumbing Company, one of the defendants herein, by the terms and conditions of which said contract, the said defendant granted to the said Newman Plumbing Company a contract to lay the laterals necessary and desired by the said defendant in the streets and alleys of the city of Shawnee, and in the vicinity and in the same streets and alleys which are now occupied by the laterals of your orator herein, and that the said Newman Plumbing Company is preparing to, and will unless enjoined and restrained by your honors, proceed under its said contract to build, erect and maintain laterals alongside of the laterals of your orator.

12 15th. That in pursuance of its contract, your orator constructed its sewer system along the streets and alleys of the said city, following as near as practicable for its purpose, the natural drainage of the said city, and did build laterals and connect with the closets of the private property of the said city, and did charge the owners of such property a reasonable consideration for the use of the said sewer system, which said consideration was fixed by an agreement between the city council and your orator, and now owns laterals and district sewers in different streets and alleys in the city of Shawnee, which are of the value of Thirty Thousand Dollars (\$30,000.), and that if the said defendant is permitted to construct laterals and district sewers therein that would cover the same streets and alleys as your orator, and take the same course, conforming with the natural drainage of the said city, and would cause the citizens of the said city to connect with it for the following reasons, to-wit; that as the city must tax to build and maintain such system, and no other or further consideration would be required, and that the said citizens whose property is now connected with your orator's system would be taxed to maintain the defendant's sewer system whether connected with it or not, and therefore would be induced to connect with the said system of the defendant, and the property of your orator, now being wholly underground, would be worthless and valueless, and would be totally destroyed, which is now of the value as aforesaid of Thirty Thousand Dollars (\$30,000.).

16th. Your orator further alleges and says that it is ready and willing to carry out the terms of its contract above referred to as Exhibit E, and also the terms of the contract referred to as Exhibit D, and that the citizens in the several sewer districts are anxious

13 for the defendant to carry out the terms of the said contract and to have the laterals of your orator appraised as provided therein, and to have the amount of such appraisal taxed to their property, and that several citizens of the several sewer districts have petitioned the defendant to do so, and in disregard of the said contract, allowed the said Newman Plumbing Company to build new, separate and independent laterals in the said sewer districts.

17th. Your orator further shows to your honors that they are willing and ready, and have offered to lower their said laterals, if they needed to be lowered; to repair and to put into condition the conduits or pipe of the several sewer districts.

18th. Your orator further states that the contract above referred to as Exhibit E, was made in consideration of the defendants herein agreeing to recognize the rights of your orator in laterals laid in the streets and alleys of the city of Shawnee, as aforesaid, and in consideration that the said defendant would at the time that the said city was divided into sewer districts for the purpose of constructing and laying laterals in the said districts, to tax up the laterals owned by your orator to the abutting property owners along the streets and alleys in which the laterals were laid, at a price to be agreed upon, and deliver such tax warrants to your orator, which should be in payment of the said laterals, and that the said city has been districted into sewer districts as contemplated in the said contract, but the said defendant has failed, refused and neglected, although often requested by the plaintiff, your orator herein, to appraise the laterals of your orator, or to agree with your orator on the price of the said laterals, and has wholly failed, refused and neglected to use all lawful means to tax up the said laterals to the abut-

ting property and deliver tax warrants unto your orator, and  
14 has wholly failed, refused and neglected to in any way buy  
or purchase or condemn the laterals belonging to your orator,  
and has refused at all times, and now continues to refuse to permit  
the citizens of the sewer districts to purchase the laterals of your  
orator, but for the purpose of confiscating your orator's property  
and rendering it worthless and valueless, and in total disregard of  
its contract and of the decree heretofore referred to, it has let a  
contract to the Newman Plumbing Company to build laterals in the  
same streets and alleys that are now covered by the laterals of your  
orator, although the contract price to the said Newman Plumbing  
Company is far in excess and more expensive to the property owners  
than the laterals of your orator, although such laterals are now and  
were on the 3rd day of March, 1907, adequate, to accommodate con-  
nection with the defendant's main sewer, and if the same are in-  
adequate your orator has offered and now offers to make them  
adequate.

19th. That on or about the 1st day of June 1908, the said city of Shawnee, and the defendant herein, acting as its officers, as aforesaid, caused the city engineer of said city of Shawnee to make plans and specifications for the building of laterals in the said city of Shawnee and in the several districts thereof, and did divide said city into four districts, and that said engineer having said authority did make and cause to be made, plans and specifications of the laterals, and that said plans and specifications show that each of the laterals of said sewer districts should be laid in certain streets and alleys of the said city and on certain sides, to be of certain material and certain depths in the ground, and at certain places in the said streets and alleys, and that said plans and specifications of the said

15 engineer required said laterals to be constructed and laid in the said streets and alleys in exact conformity with the laterals and sewer pipes owned by the plaintiff herein and in the same streets and alleys, and to be made of the same material and to be placed in substantially the same places, and the same depths, and said city engineer filed with said city of Shawnee and its officers, his report showing said plans and specifications, and that the plaintiff herein, your orator, at once proposed and offered to lower and raised as conditions might require, his said laterals and sewer pipes, so that they would in all respects conform with the plans and specifications of the said engineer, but that the said defendants and each of them refused to entertain said proposition, and at once made the contract as aforesaid with the said defendant, Newman Plumbing Company.

20th. Your orator further shows to your honors that the said laterals owned by it are as aforesaid, in every way adequate to accommodate connections with the defendant's mains, and that they are in every respect sufficient and adequate, but that the defendant refused to carry out the terms of the said contract, and all and every part thereof for the purpose of confiscating the property of your orator and of appropriating the same without due process of law.

21st. Your orator further alleges and shows to your honors that the said contract between the defendant and the Newman Plumbing Company is void and of no force and effect, for the reason that it would be impairing the obligation of your orator's contract with the defendant and would be appropriating your orator's property without due process of law for public purposes, and would be confiscating the property of the plaintiff, contrary to the Constitution of the United States and of the State of Oklahoma.

16 22nd. The said city of Shawnee ordered the said laterals to be laid along the course which the pipes and laterals of your orator were laid, and has attempted to assess the costs of the same upon the abutting property owners, and has attempted to confiscate and appropriate the sewer system of your orator by constructing a sewer system in the same vicinity and in the same portion of the city, and assessing the property of the plaintiff and charging it against your orator without any authority *at* law, and for the purpose of damaging your orator and for no other purpose.

23rd. Your orator further shows to your honors that the said city of Shawnee, did as heretofore stated, vote bonds at an election held on the 6th day of November, 1906, in the sum of One Hundred Sixty-five Thousand Dollars (\$165,000), for the purposes of constructing a sewer system for sanitary and health purposes, and for the construction and re-construction and extension of the water works system of the city of Shawnee, and when said election was held said bonds were issued and authorized to be issued under the provisions of an amendment of an Act approved March 4, 1898, entitled An Act to Amend an Act to prohibit the Passage of Local and special Laws in the Territory, to limit Territorial indebtedness, etc., and that the contract herein referred to marked "Exhibit E" between and on behalf of the City of Shawnee and its officers and the plain-

tiff herein, was made under and by virtue of the authority conferred by the said Act of Congress upon the said city, to provide and construct a proper sewer system in the said city of Shawnee, and at the time of voting said bonds, and for many years prior thereto, and continuously since the city of Shawnee has been a town of more than one thousand inhabitants, and at the time of voting  
 17 said bonds was a municipal corporation as a city of the first class, having a *bona fide* population of more than one thousand as shown by the last census taken before the said election on the 6th day of November, but that said city of Shawnee and its officers are now claiming and pretending that it has no authority to execute said contract because the statutes of Oklahoma provided for the construction of laterals, but under said Acts of Congress, said city of Shawnee did have power and authority and its contract was in all respects legal and valid, and under and by virtue of said Act of Congress said plaintiff is entitled to have the said contract enforced, and said defendants and each of them are enjoined from violating the same.

24th. Your orator further shows to your honors that your orator has no adequate remedy at law, and is entitled to have an order enjoining said defendants from violating the rights of the said plaintiff as given by said contract made and exhibited as aforesaid and the said decree against the said city of Shawnee as aforesaid, and is entitled to have a mandatory writ of injunction requiring said city and its officers to conform to said contract and said decree.

Wherefore inasmuch as your orator can have no adequate relief at law, and to the end that the defendants may be restrained and enjoined, your orator prays that the said defendants and each of them be enjoined from constructing within the said city of Shawnee any laterals or sewers connected in the streets and alleys where the plaintiff's laterals are situated and were situated on the 3rd day of March, 1908, and from doing or performing anything that tends to appropriate the property of the said plaintiff without due compensation, or does impair the obligations of the contract of the  
 18 parties, or deprive your orator of its property without due process of law, and for such other things as to your honors may seem just and equitable, and to which your orator would in equity and good conscience be entitled, and for the costs of this action and your orator will as in duty bound, ever pray.

B. B. BLAKENEY AND  
 J. H. MAXEY, JR.,  
*Solicitors for Plaintiff.*

B. B. BLAKENEY AND  
 J. H. MAXEY, JR.,  
*At'tys for Plff.*

STATE OF OKLAHOMA,  
*Pottawatomie County:*

C. W. Kerfoot, being first duly sworn, on oath deposes and says that he is the president of the Shawnee Sewerage & Drainage Com-

pany, the plaintiff in the above entitled suit; that he has carefully read the above and foregoing bill, and the contents thereof are within his knowledge, and that the same are true and correct as he verily believes.

C. W. KERFOOT.

Subscribed and sworn to before me this 18th day of July, 1908.  
[SEAL.] HALLIE WHITAKER,

*Notary Public.*

My Commission expires Nov. 27, 1911.

19

EXHIBIT "A."

*Ordinance No. 228.*

An Ordinance Providing for a Franchise to Construct, Maintain, Operate, and Own a System of Sewerage in the City of Shawnee, Oklahoma Territory.

Be it Ordained by the Mayor and Council of the City of Shawnee:

SECTION 1. That the De Bruler, Newman & Co., their successors or assigns, are hereby granted the privilege for and during a period of fifty years to build maintain and operate a system of sewerage in the City of Shawnee, with necessary Y's, branches, man-holes, flush tanks, etc., along certain lines in the City of Shawnee, for supplying the business houses and inhabitants adjacent to the said lines with a conduit to dispose of all waste water from closets, urinals, bath tubs, lavatories and for all other purposes, public and private.

SEC. 2. The said De Bruler, Newman & Co., are granted the right to maintain, build and maintain, and construct such sewerage system along the streets and alleys of the said City upon the following conditions: first; they shall replace all streets and alleys after the laying of the said sewerage pipes in as good condition as they were before the laying of the said pipes, Second: that the work of constructing the said sewerage system shall begin on or before the 1st day of January, 1902, and that the said system shall be completed in the business portion of the said City within five months from the date of the beginning of the construction thereof.

SEC. 3. Said sewer system shall be constructed out of first class material, and the pipes of sufficient dimensions to carry off all waste water, and during the year 1902, there shall be a sufficient portion of the said system completed and in running order to supply the needs of all the business portion of the said City; and that from time to time as the said business portion of the City expands, or the inhabitants of the residence portion of the said city may desire sewerage convenience in such numbers as in the opinion of the grantees and the City Council to make it profitable to do so, the grantees agree to extend said sewer system to supply said needs.

SEC. 4. That said grantees are required to keep said sewer system

and all extensions thereof in good repair and to save the city harmless from any damage occasioned by reason of leakage or overflow.

SEC. 5. The rates or rentals charged for the use of the said sewers to be paid by all parties using them shall be such as are charged in other cities for like sewer service, to be determined by the grantees and a committee of three members of the City Council.

SEC. 6. The said grantees shall allow the use of the said sewers for City Hall, jail, fire department and public watering troughs within the limits of the said system, free of charge.

SEC. 7. The said grantees are prohibited from interfering in the construction of their sewer system with any water main or service pipe extending from curb to main line.

SEC. 8. The said grantees shall furnish at their own expense all material, supplies and labor for the engineering, constructing, maintaining, extending and improving the said sewer system and the said grantees shall have the exclusive right to tap and extend all sewer connections to property line. But the said city binds itself to furnish water to flush said sewers free of charge, when in the opinion of the

said Grantees and the city council *me* be necessary.

21 SEC. 9. At the expiration of fifteen years, the City of Shawnee shall have the absolute right to purchase said sewer system from the said grantees, their successors or assigns, if the said City so desire, at the exact cost of the construction of the said system; in order to keep the city informed of the exact cost of construction of the said system, the grantees, their successors or assigns, shall furnish to the said City a verified, itemized statement of the costs of the material and labor in the construction of the said sewer or any extension thereto, as soon as the same is completed. But if the said City should not desire or conclude to purchase said sewer system at the end of fifteen years, this franchise shall run for the full fifty years from the beginning of the work, but if at any time after the completion of the said system, or any extension thereto, the grantees, their successors or assigns should totally abandon the said system, or allow it to get out of repair, or to get in such condition as to be dangerous to the health or property of the inhabitants of the said city, and to remain in that condition so long as to become a public nuisance the city shall, after notifying the said grantees, their successors or assigns to do so in a reasonable time, have the right to condemn the same as a nuisance, and either repair the same at the expense of the said grantee, their successors or assigns, such expense to be a lien on said system, or to proceed to abate as by law provided.

SEC. 10. Before the franchise authorized by this ordinance shall take effect and be in force, the said De Bruler, Newman & Co., shall enter into a bond to the said city of Shawnee in the sum of One Thousand Dollars (\$1,000.00) to be approved by the council of the

said city and for the faithful performance of this franchise.

22 SEC. 11. If the construction of the said sewer is not commenced in good faith, on or before the first day of January, 1902, then this franchise shall be null and void.

SEC. 12. This ordinance shall take effect and be in force from and

After its passage approval and publication and the execution of the bond provided for in section ten of this ordinance.

Passed the City Council this November 22nd, 1901.

JAMES T. FARRALL, *Mayor.*

Attest:

J. S. MCINTYRE,  
*City Clerk.*

23

EXHIBIT "B."

*Ordinance No. 241.*

An Ordinance Amending Sections One and Nine of Ordinance No. 228, Granting to De Bruler, Newman & Co., Their Successors and Assigns, a Contract to Maintain, Operate, and Run a System of Sewerage in the City of Shawnee, Oklahoma Territory.

Be it ordained by the mayor and councilmen of the city of Shawnee:

SEC. 1. That section one of the said ordinance No. 228, granting to De Bruler, Newman & Co., a franchise to construct, maintain, operate and run a system of sewerage in the City of Shawnee, be and the same is hereby amended to read as follows:

SECTION 1. That De Bruler, Newman & Co., their successors and assigns are hereby granted the privilege to build, operate and maintain a system of sewerage in the City of Shawnee with necessary Ys, branches, man-holes, flush tanks, etc., along certain lines in said city for supplying the business houses, and inhabitants adjacent to said lines, with conduits to dispose of all waste water from closets, urinals, bath-tubs lavatories and for all other purposes public and private.

SEC. 2. That section Nine (9) of said ordinance No. 228 be and the same is hereby amended to read as follows:

SECTION 9. At the expiration of twenty-ne years the city of Shawnee shall have the absolute right to purchase said sewer system from the said grantees, their successors and assigns if said city shall desire at the cost of the construction of the said sewer and in order to keep the said city informed of the exact cost of construction of the said system, the grantees, their successors or assigns, shall furnish

24 to said city a verified, itemized statement of the cost of such material and labor in the construction of said sewers or any

extension thereto as soon as the labor is completed, but if the said city should not desire or conclude to purchase the said system at the expiration of twenty-ne years, this franchise shall remain in full force and effect until such time as the said city shall conclude to purchase same at the terms and on the conditions heretofore set forth in this ordinance, but if the said city shall neglect or refuse to purchase same at the expiration of twenty-one years they shall not have the right to make the election to purchase the same, except by and with the consent of the grantees, their successors or assigns, until a period of five years has elapsed after the expiration of the twenty-

one years but if at any time after the completion of the said sewer system or any extension thereof, the grantees, their successors or assigns should totally abandon said sewer system or allow it to get out of repair or to become in such condition as to be dangerous to the health or property of the inhabitants of the said city, and to remain in that condition so long as to become a public nuisance, the city shall, after notifying the grantee, their successors or assigns to do within a reasonable time, the failure of the grantees, their successors or assigns to do so if within the city, or if the grantees, their successors or assigns shall be out of the city so that service can not be had upon them within the city of Shawnee, the City shall have a right to condemn the same as a nuisance and either repair the same to the expense of the grantees, their successors or assigns. Such expense to be a lien on said sewer system or proceed to abate the same as provided by law.

25 SEC. 3. This ordinance shall take effect and be in force from and after its passage, approval and publication and acceptance in writing by the Shawnee Sewerage & Drainage Co., successors to De Bruler, Newman & Co.,

Passed and approved this 25th day of February, 1902.

Attest:

J. S. McINTYRE,  
*City Clerk.*

The above amendment to ordinance No. 228, and every provision thereof are hereby accepted and approved this 27th day of February, 1902.

SHAWNEE SEWERAGE & DRAINAGE CO.,  
*Successors to De Bruler, Newman & Co.*  
By C. W. KERFOOT, *President of said Co.*

*Ordinance No. 242.*

An Ordinance Ratifying the Transfer of the Franchise Granted by Ordinance No. 228, as Amended by Ordinance No. 241, for the Construction, Maintenance of a System of Sewers in the City of Shawnee from De Bruler, Newman & Co. to the Shawnee Sewerage & Drainage Co., and Authorizing said Company to Mortgage its Property, Rights, and Franchise.

Be it ordained by the Mayor and Councilmen of the City of Shawnee.

SEC. 1. That the transfer of the rights and privileges, titles and immunities, granted the De Bruler, Newman & Co., by ordinance No. 228 as amended by ordinance No. 241, of the City of Shawnee from the said De Bruler, Newman & Co., to the Shawnee Sewerage and Drainage Co., is hereby ratified, confirmed and approved, and the said Shawnee Sewerage & Drainage Co., shall be entitled to all

the rights and privileges expressed in the said ordinance as fully as though granted directly to the said Shawnee Sewerage & Drainage Co., and shall be and remain under all duties and obligations thereby imposed upon the De Bruler, Newman & Co., with like effect as if the privileges had been granted originally to the Shawnee Sewerage & Drainage Co.,

SEC. 2. The said Shawnee Sewerage and Drainage Co., is hereby authorized to borrow the sum of twenty-five thousand dollars (\$25,000) and to execute a mortgage or deed of trust to secure the same on its properties, rights and franchises in the City of Shawnee at a rate not to exceed six per cent. per annum and for a period of twenty-one years to secure the payment of the said loan, Providing; that the making of such loan shall not interfere with the rights of the said City to purchase said plant at any period prescribed in ordinance No. 228 as amended by ordinance No. 241 and that the said City may at its option call said bonds at any period and deduct the amount thereof from the price to be paid to the said Shawnee Sewerage & Drainage Co., its successors or assigns and Provided, further, that unless the said City shall elect to purchase the said plant subject to said bonds and mortgage and continue the same in force and under no circumstances shall the City be liable for the payment of the said bonds or any part thereof.

SEC. 3. This ordinance shall be in force and effect from and after its passage, approval and publication.

Passed this 26th day of February, 1902.

H. S. McINTYRE,  
*City Clerk.*

Approved this 26th day of February, 1902.

JAMES FARRALL, *Mayor.*

28

#### EXHIBIT "D."

TERRITORY OF OKLAHOMA,  
*County of Pottawatomie:*

In the District Court in and for said County and State.

SHAWNEE SEWERAGE & DRAINAGE CO., a Corporation, Plaintiff,

vs.

J. M. AYDELOTTE, as Mayor; CHARLES J. BECKER, as City Clerk, and John Lain, William Ried, R. H. Clayton, J. A. Farris, T. B. Hogg, F. M. Blakely, Arthur Dimmers, John W. Atterburry, Sidney Clark, Jr., P. E. Noll, J. H. Pemberton, and Hal Johnson, as Councilmen of the City of Shawnee, and the City of Shawnee, a Municipal Corporation, Defendants.

*Decree.*

On this the 22nd day of December, 1906, the same being a regular day of the September, 1906, term of the District Court in and for the said County and State, and the above entitled cause being regularly set for trial on the said day and date, and the plaintiff ap-

pearing by his attorneys, Blakeney & Maxey and the defendants, J. M. Aydelotte, as Mayor, Charles J. Becker, as City Clerk, and John Lain, William Ried, R. H. Clayton, J. A. Farris, T. B. Hogg, F. M. Blakely, Arthur Dimmers, John W. Atterburry, Sidney Clark, Jr., P. E. Noll, J. H. Pemberton and Hal Johnson, as Councilmen of the City of Shawnee, appearing by their attorney, F. H. Riley, and the City of Shawnee, a municipal corporation, appearing by its duly elected, qualified and acting City Attorney and thereupon the plaintiff and each of the defendants announced ready for trial, and the court after hearing argument of counsel and being fully advised in the premises upon the facts of the law, finds as follows:

29      That the plaintiff is a private corporation duly organized under the laws of the Territory of Oklahoma, and is at this time engaged in the business of owning and operating a system of sewerage in the City of Shawnee, Oklahoma Territory, under and by the authority of an ordinance of the said city of Shawnee, duly and legally granted to De Bruler-Newman & Company and transferred to plaintiff; that under said franchise ordinance the plaintiff among other things constructed a main sewer from the point beginning at the north edge of the man-hole in Philadelphia Avenue in the City of Shawnee, which point is one hundred and fifty (150) feet north of the north line of Main Street, thence south along Philadelphia Avenue six hundred eighty-three and four tenths (683.4) feet to Seventh Street, thence east on Seventh Street three hundred fifty-two (352) feet to Oklahoma Avenue, thence south along Oklahoma Avenue and the projection thereof four thousand two hundred seventy (4270) feet to the north side of the north fork of the Canadian River, together with certain man-holes, connections and bulk-heads, which said main sewer follows the principle course of drainage and that said main sewer is now of the value of six thousand nine hundred dollars (\$6990.); the court further finds that the plaintiff by lawful transfer thereof and by due ratification by the City of Shawnee is the legal owner and holder of the said franchise and all the rights granted thereunder, together with the man holes, bulk-heads and connections and right of way through which said sewer runs; the court further finds that the plaintiff has sold its bonds to innocent purchasers to raise money for the purpose of constructing said sewer.

30      The court further finds that on the first day of October, 1906, the City of Shawnee, by an ordinance duly and legally enacted by the mayor and councilmen in regular session, authorized and empowered the mayor of the city of Shawnee to issue his proclamation calling a special election to vote upon the question of the issuance of bonds to the sum of one hundred and sixty-five thousand dollars (\$165,000) for the purpose of securing funds to pay for the construction of sewers for sanitary and health purposes and for construction, reconstruction and extention of water-works in the city of Shawnee, said bonds to run for a period of thirty (30) years from the date of their issuance and to contain all necessary conditions as to form, and to bear interest at the rate of not to exceed six (6) per cent. per annum, said interest to — paid semi-annually and none

of the said bonds to be sold for less than par; the said court further finds that the said ordinance, which was numbered 500, was legally published as by law required, in the Shawnee Herald, a newspaper of general circulation in the City of Shawnee, and was in full force at the time of the issuance of a proclamation calling said special election.

The court further finds that on the 5th day of October, 1906, the mayor of the City of Shawnee, issued his proclamation calling a special election for the 6th day of November, 1906, in due and regular form, and in conformity with the provisions of said ordinance No. 500, submitting to the qualified electors and owners of real or personal property subject to taxation within said City of Shawnee, the question of the issuance of bonds for the construction and cost of sanitary sewers, and for the construction, reconstruction and extension of the water-works and that the same be published as by law required.

31 The court further finds that in conformity with the said election proclamation at the time and date therein provided, said special election was duly and legally held, carried on and conducted as by law provided and that no one voted at the said election but qualified electors within the City of Shawnee and owners of real or personal property subject to taxation within the City of Shawnee and that more than two-thirds of the qualified electors and owners of real or personal property within the City of Shawnee voted in the affirmative on the said proposition and that the mayor and councilmen were thereby authorized to issue said bonds in the amount and for the purposes therein stated.

It is Therefore by the court considered and adjudged that the plaintiff, the Shawnee Sewerage and Drainage Company, has a legal franchise of carrying on the business of operating a sewer system in the city of Shawnee, and that the Construction and operation of a sewer system by the City of Shawnee in the immediate vicinity of said sewer, would confiscate the plaintiff's property and depreciate the value of the bonds thereon.

It is further considered and ordered by the court that Ordinance No. 500 of the City of Shawnee, entitled "An Ordinance calling an election in the City of Shawnee, Pottawatomie County, Oklahoma, for the purpose of voting upon the question of the said city issuing bonds in the sum of \$165,000, the money to be derived from the sale of such bonds to be used for the purpose of constructing sewers for sanitary and health purposes and for the construction, reconstruction and extension of the water-works," was legally enacted by the mayor and councilmen of the City of Shawnee and approved by the mayor thereof on the 4th day of October, 1906, and published as by the law required, and is legal and binding and in full force and effect.

32 It is further considered and adjudged by the court that the proclamation of the mayor, issued in pursuance of Ordinance No. 500, and was in legal form and authorized the holding of the said special election on the 6th day of November, 1906, and was in due and legal form.

It is further considered and adjudged that the form of ballot authorized in said proclamation and used in said election was in all respects legal.

It is further considered and adjudged that there were 1299 qualified electors who were owners of real and personal property subject to taxation within the City of Shawnee on the 6th day of November, 1906, and that 1080 of the said electors voted in the affirmative at the said election and that 219 electors voted in the negative and that more than two-thirds of the said qualified electors who were owners of real or personal property subject to taxation in the City of Shawnee, voted in the affirmative and that said question submitted in said proclamation was carried and that said election was conducted as provided by law.

It is further considered and adjudged that the said mayor and councilmen were and are hereby authorized to issue the said bonds of the said city in the sum of one hundred sixty five thousand dollars (\$165,000) to run for thirty (30) years from their date of issuance and bearing interest not exceeding six per cent. per annum and to be sold for not less than par.

It is further adjudged and decreed that the mayor and councilmen of the City of Shawnee, be and they are hereby enjoined from building or providing a sewerage system in the vicinity of the plaintiff, said sewer main as herein described until after plaintiff's said sewer main shall be condemned or purchased by the City of Shawnee.

33 It is further considered, ordered and adjudged by the court that the provisions of the act of March 4th, 1898, which is entitled, "An act to amend an act to prohibit the passage of local of special laws in the territories to limit territorial indebtedness, etc.," have been in all respects duly and strictly complied with and that bonds ought to be issued by the City of Shawnee and the said mayor and the councilmen thereof within the terms and authorized by said act, and are for sewers, for sanitary and health purposes and the construction, reconstruction and the extention of the water-works system and that the said Ordinance No. 500, passed as aforesaid by the mayor and the councilmen, the notice and proclamation of election given in pursuance of its terms and the election held thereunder were all and each of them in compliance with all the terms and provisions of the said act, and that the said election held thereunder and in compliance with said ordinance and proclamation was in all respects properly held and conducted, and the said mayor and councilmen were authorized and empowered to issue the bonds of the said City of Shawnee, containing the ordinary terms and conditions, showing the compliance with the said act of Congress as aforesaid, and of the laws of the Territory of Oklahoma, in the sum of \$165,000.00 for the purpose of constructing the said sewer system and water-works, extention, construction and reconstruction, as herein provided.

It is further considered and adjudged that in the event that the City of Shawnee condemns or purchases the main sewer as hereinbefore described, from the plaintiff herein, that the said City of Shawnee and its mayor and councilmen are hereby enjoined from prevent-

ing the said plaintiff from connecting with main sewer free of charge  
and to use the same by such connections, all the district sewers  
34 and laterals belonging to the plaintiff in operation within said  
city at the date of the rendition of this judgment.

It is further considered and ordered that the temporary restraining order herein granted on the 4th day of December, 1906 be and the same is set aside and held for naught and that the plaintiff recover of defendants herein all costs in this behalf expended, for which let execution issue.

B. F. BURWELL, *Judge.*

35

EXHIBIT "E."

This memorandum of contract and executed in duplicate on the  
— day of March, 1907, as an agreement, embodying the terms of  
settlement between the Shawnee Sewerage & Drainage Company,  
a party of the first part, and the Committee appointed by the City  
Council of the City of Shawnee, to adjust the differences existing  
between the said party of the first part and the party of the second  
part, and to effect a settlement of the litigation and claims arising out  
of such matters.

Witnesseth: That the party of the first part has entered into an  
agreement with the party of the second part, as follows, to-wit: That  
for and in consideration of the sum of \$6,900.00 and all stipulations  
hereinafter set forth, the party of the first part does hereby agree to  
sell and transfer to the said City of Shawnee all of its main line of  
sewer, beginning on the north bank of the Canadian River in section  
thirty, township ten north range -our east of the I. M., extending  
north to the corner of 7th and Oklahoma Streets, running thence  
west on Seventh to the corner of Philadelphia, thence north to the  
alley north of Main street, on Philadelphia Avenue and the further  
stipulations as follows: That the party of the second part shall and  
will recognize the rights of the party of the first part the owners of  
certain laterals now laid in the said city, and the said party of the  
second part shall at the time the said city shall be districted into  
sewer districts for the purpose of laying and constructing laterals in  
the said sewer districts, the said City shall cause said laterals of the  
said party of the first part to be appraised, in case agreement cannot  
be had for the value thereof, by the appointment of a commission,  
one to be selected by the city, one to be selected by the party of the  
first part and one to be selected by the owner of the property  
36 to be affected, which said parties shall fix the price of the  
laterals, and the said city shall then use all lawful means to  
tax up the said laterals at the price agreed upon to the abutting prop-  
erty and deliver the tax warrants unto the party of the first part,  
which shall be in full payment for said laterals, in so far as the  
abutting property is concerned, and the said city shall not be liable  
as for the payment of the said warrants and it is further understood  
the said city does not attempt to bind itself any further than war-  
ranted and permitted by law. It is further agreed that said party  
of the second part shall not build any new laterals up any alley in

which the laterals of the party of the first part are now situated, unless said laterals as now existing are inadequate to accommodate connections. If said laterals belonging to the party of the first part cannot be used for connection on account of being too shallow in the ground, or for any other reason, then same shall not be considered in this agreement and the said City shall have the right to construct other laterals belonging to the said party of the *said party of the second part* or to deepen or repair the said laterals belonging to the party of the first part at its expense and then proceed as above set forth.

It is further stipulated and agreed by and between the parties hereto, that the said party of the first part shall have the privileges of connecting its pipes and laterals now located in the City of Shawnee with the means of other laterals, that may at any time be owned by the said city until such time as the said city shall purchase as herein stated, the properties of the party of the first part, free of charge and without restriction.

37 In witness whereof the parties have hereunto set their hands in duplicate on this the 3rd day of March, 1907.

SHAWNEE SEWERAGE AND DRAINAGE CO.,

(Signed) By C. W. KERFOOT, *President.*

Attest:

\_\_\_\_\_, *Sec'y.*

(Signed) J. W. ATTEBURY,  
R. H. CLAYTON,  
WM. REID,  
*Council Committee.*

38

EXHIBIT "F."

To the Hon. Mayor and City Council.

GENTLEMEN: We beg to submit the following bid for construction of lateral sewers in all allies and streets as advertised, in which are now covered by lateral sewers owned by the Shawnee Sewerage and Drainage Co.

We will relay and lower the laterals owned by this Company to the depth required by the plans and specifications of the City engineer, and under his direction and at the engineer's estimates of cost for the new laterals and in good workmenlike manner.

We make this bid in order to comply with the terms of a previous contract made by this company with the City Council.

Very respectfully,

THE SHAWNEE SEWERAGE & DRAINAGE CO.,

(Signed) By C. W. KERFOOT.

(Signed) C. J. BENSON, *Sec'y.*

39 TERRITORY OF OKLAHOMA,  
*County of Pottawatomie:*

In the District Court in and for the said County and Territory.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, a Corporation,  
Plaintiff,

vs.

J. M. AYDELOTTE, as Mayor of the City of Shawnee; CHARLES J. Becker, as City Clerk, and John Lain, William Reid, Frank M. Blakley, T. B. Hogg, R. H. Clayton, J. A. Farriss, Arthur Dimmers, John E. Atterbury, Sidney Clark, Jr., P. E. Noll, J. H. Pemberton, and Hal Johnson, as Members of the City Council of the City of Shawnee, and *in* The City of Shawnee.

*Petition.*

Comes now the plaintiff in the above entitled action and complaining of the said defendants and each of them for cause of action, allege and say:-

1st. That the plaintiff is a private corporation duly organized under the laws of the Territory of Oklahoma, and *have* been such corporation at all the times hereinafter mentioned, and as such private corporation is engaged in the business of owning, construction, operating a system of sewerage in the city of Shawnee, Pottawatomie County Oklahoma, and *have* been engaged in such business at all times hereinafter mentioned.

2nd. That on the 22nd day of November, 1901, the City of Shawnee, being then as now, a city of the first class, incorporated and organized under and by virtue of the laws of the Territory of Oklahoma, relating to the corporation of cities of the first class, did by ordinance numbered 228, grant to De Bruler, Newman & Company their successors and assigns, the privilege for and during a period of fifty years to build and maintain within the city of Shawnee, a system of sewerage, with necessary Y's, branches, manholes, flush tanks and other appurtenances essential to the construction and maintenances of such sewer system, for the supplying of business houses and inhabitants with a conduit to dispose of all waste water from all closets, urinals, bath tubs, lavatories, and for all other public and private purposes, which said ordinance among other things provided that the said grantees, De Bruler, Newman & Company should enter into a bond of \$1000.00 to be approved by the council of the said city, for the faithful performance of the duties and obligations imposed upon them by the said franchise, and should commence the construction of the said sewer system on or before the first day of January, 1902; that the said ordinance was duly approved by the mayor of the said city, and was published on the 21st day of November, 1901, in the Shawnee Democrat, a daily newspaper of general circulation in the said city and county, published in the said city; a copy of the

said ordinance is hereto attached, marked "Exhibit A," and made a part hereof.

3rd. That thereafter, to-wit; on or about the 28 day of February, 1902, the mayor and common council of the said city of Shawnee, for the said city of Shawnee passed an ordinance numbered 241, by the terms and conditions of which they amended the said ordinance numbered 228, and provided therein that the said franchise should be granted to De Bruler, Newman & Company and their successors and assigns for a period of twenty-one years, and did in all things ratify and confirm the provisions of the former ordinance passed, except that the date in which the constructions should commence, was extended to the — day of —, 190—, a copy of the said ordinance is hereunto attached, marked "Exhibit B" and made a part hereof.

41 4th. That thereafter, to-wit; on or about the first day of February, 1902, the said De Bruler, Newman & Company, for a valuable consideration, assigned, transferred and set over to the Shawnee Sewerage & Drainage Company, all of its privileges, rights, immunities, properties, interests in and to their system of sewerage, granted to them under the provisions of the said ordinances above referred to, and all and every ordinances of the city of Shawnee, and that thereafter, to-wit: on the 26th day of February, 1902, the said defendant, and the mayor and city council of the city of Shawnee, did, by ordinance numbered 242, transfer, ratify and confirm the transfer of the rights, privileges, titles and immunities granted to De Bruler, Newman & Company, by the said ordinance No. 228, and as amended by ordinance No. 241, of the city of Shawnee, from the said De Bruler, Newman & Company to the Shawnee Sewerage & Drainage Company, and did thereby vest the plaintiff with all the interests, titles, rights, privileges and immunities of the said franchises, for the building, constructing, erecting and maintaining a system of sewerage in the city of Shawnee, to the plaintiffs in this action, and did by the said ordinance authorize and empower the plaintiff to mortgage the said properties, rights and privileges, to secure a sum not to exceed the sum of twenty-five thousand dollars, and did in the said ordinance provide that the said city should have the option to buy the said system at the exact cost of the construction of the said system, and the costs of labor and material in the construction of the said sewer or any extension thereof, from and after the expiration of fifty years from the date of the passage of the said ordinance. A copy of the said ordinance is hereto attached, marked "Exhibit C" and made a part hereof.

42 5th. That by the terms of the said ordinance numbered 228 and the other ordinances numbered 241 and 242, the said De Bruler, Newman & Company and their successors and assigns, the plaintiffs herein, contracted and agreed to allow the use of the said sewers for the city hall, jail, and fire department and public watering troughs, within the limits of the said sewer system free of charge, and the said city obligated and bound itself to furnish water to flush the said sewer free of charge, when in the opinion

of the said grantees, and their assigns, the plaintiffs herein, and the city council should deem it necessary.

6th. That on or about the first day of December, 1901, the said De Bruler, Newman & Company, having there-fore given their bond in the sum of one thousand dollars conditioned as by the said ordinances required, and approved by the said city of Shawnee, did commence the construction of the said sewer system, and did continue the said construction until the said transfer aforesaid to the plaintiffs in this action, and the said plaintiff did there-upon continue the construction of the said system and extended its mains and laterals over and throughout the limits of the said city and did expend and invest in such extensions the total sum of \$50,000.00, and did, pursuant to the conditions of the said ordinance No. 242, issue its notes and bonds in the sum of \$25,000.00 payable 21 years from the date thereof, bearing 6 per cent. interest and as security for the payment of the said bonds did execute its mortgage upon all of its properties and franchises, situated in the said city of Shawnee to the holder of the said notes and bonds, and did furnish to the said city and did allow to the said city the use of its sewer for the city hall, fire department, jail, and public

watering troughs within the limits of the said sewer system  
43 free of charge, and did connect its said system with the said jail, city hall and fire department, and did permit the city to erect six watering troughs *within* to connect with the overflow of the same with the said system, and did in all and everything comply with the conditions, duties, and obligations imposed by the said ordinances, and is now and has continuously since the said time maintained the said sewerage system, and has maintained its connections with the city hall, jail, fire department and public watering troughs, and has meet all of the demands and necessities of the said city of Shawnee for sewerage purposes and has in all respects and in good faith carried out and observed the terms and conditions of the said ordinances granting to it privileges, franchises and immunities as above stated.

7th. That the said plaintiff is the owner of the said property, of the aggregated value of about fifty thousand dollars, situated in the city of Shawnee, and on which it is regularly assessed, and pays to the said city, to the said county and to the said Territory its proper, just and legal taxes upon its said properties and all of the said taxes imposed by the said city upon the property of the property owners of the city of Shawnee, are extend- to, charge-against and collected from the said plaintiff's property as the plaintiff's interests appear from time to time and as assessed.

8th. That on or about the first day of December, 1901, the said city of Shawnee passed an ordinance, providing that wherever such sewer system should be extended, that all over ground closets should be declared public nuisance- and requiring the property owners adjacent to any such extension to connect with the said sewer system, the said ordinance being passed for the purpose of encouraging the building of the said sewer system by the said

44 grantees and their assigns, the plaintiffs herein, but that immediately after the investment of the said large sum of money in the construction of the said sewer system, the said city repealed the said ordinance, and has habitually and systematically hampered and discouraged and by divers means attempted to impair the investment of the said plaintiff and to destroy *their* property, and to take the same without paying therefor any consideration, well knowing that the plaintiff had invested the large sum of money upon the faith of the franchises, and well knowing that the plaintiff had relied upon the privileges and immunities granted by the said ordinances in the making of the said investment, and that the plaintiff had so relying, made its investment as aforesaid, of about \$50,000.00, and constructed a system of sewerage adequate to the necessities, comfort and demands of the said city of Shawnee, and *are* now and for more than three years last past *have* continually maintained a system of sewerage adequate to the necessities, demands and comforts of the inhabitants and citizens of the city of Shawnee.

8th. That the plaintiff has also issued its bonds and sold the same to divers and numerous innocent purchasers for value, the names of which owners being to the plaintiffs unknown, and did execute such bonds by a mortgage on its properties as by the said ordinances permitted.

9th. That thereafter, on or about the first day of October, 1906, in utter disregard of the interests and rights of the plaintiff in disregard of the investment and vested interests of the plaintiff in and to such sewer system, and the privileges, immunities and benefits granted and assured to the plaintiffs by reason of the said ordinances as aforesaid, and its construction, maintenance and operation of its said sewerage system as aforesaid, the said

45 defendants and each of them undertook to construct, erect and maintain another and different sewerage system and to confiscate and appropriate the properties of the said plaintiff and destroy the value of such properties and to deprive the plaintiff of the benefits and privileges granted and confirmed in it by the provision of the said ordinances, and did in pursuance of the said wrongful and unlawful undertaking, attempt to issue a proclamation calling an election, and to pass an ordinance authorizing the construction and erecting of a sewerage system in the city of Shawnee. A copy of the said ordinance is hereto attached, marked "Exhibit D" and made a part thereof. That the last said ordinance is numbered 500 and is illegal, unlawful and insufficient, in the following respects, to-wit: First: That the same was not passed as required by the laws of the said Territory; Second: That the same has not been published as by the laws of the said Territory provided, in this, to-wit; that the same was not published for a period of ten days; third: that the said ordinance authorized the issuance of bonds to the amount of \$165,000.00 for the extension of water works and the construction of a sewer system and does not specify what portion of the same shall be used for water works extension and does not provide what portion of the same shall be

used for sewer system; fourth; it provided for the submission to the legal voters of the said city the question of whether or not bonds for \$165,000 should be issued, not according to the said citizens the right to vote separately upon whether bonds should be issued for extension of water works and bonds to be issued for the purpose of construction of the said sewer system, and fifth: providing that notice thereof should be given, which said notice so provided, was contrary to the provisions of the act of Congress approved March 30th, 1886, and did not authorize the giving 46 of thirty days' notice after the taking effect of the said ordinance, and did not require that the said notice should be given in proper form as required by the act of Congress. The said ordinance did not provide that any of the said funds so raised from the sale of such bonds should be used for the purpose of acquiring the property of the plaintiff under the terms and conditions of the said ordinances granting to the plaintiff its privileges, and right to construct and maintain a sewerage system in the said city, but did in effect provide for the destruction and confiscation of the property of the said plaintiff, by building parallel with the properties of the said plaintiff, and by taking the portions of the streets and alleys of the said city now occupied by the plaintiff for its sewerage system, and the said ordinance was in all respects inoperative and void.

10th. That thereafter, to-wit: on or about the 5th day of October, 1906, the said J. M. Aydelotte, as Mayor of the said city, unlawfully and without any authority therefor, issued a proclamation calling an election and submitting to the voters at the election on November 6th, 1906, the question whether or not bonds should be issued in the amount of \$165,000.00 for the purpose of extending the water works system of the said city, and constructing a sewerage system for the said city, which said notice is hereto attached, marked "Exhibit E" and made a part hereof.

11th. That the said notice was invalid, in the following particulars, to-wit: 1st. That it was not signed by any officer authorized to cause such notice to be given. 2nd. That it did not give 30 days' notice of such election. 3rd. The said notice was issued prior to the date that the said ordinance took effect. 4th. That the said notice did not specify what bonds issued as aforesaid should be used for, what amount of the same should be used 47 for the building of the sewer system, and what amount would be used in the extension of the water works: 5th. It did not provide that such moneys realized from the sale of the said bonds should be used for the condemnation of the property of the plaintiff and did not provide for the submission of the said question as by law provided, to the voters of the said city, competent to vote, at the same time and place that the other general election then held in the said city for delegate to the constitutional convention was held, but attempted to *add* provide for separate officers to conduct such election. 6th. That the said notice did not in any respect comply with the requirements of the act of Congress above referred to and was not sufficiently definite to advise and inform the voters

and persons qualified to vote thereon of the purposes for which the said funds would be used; and 7th. The said notice was not published more than thirty days prior to the said election as by law required.

12th. That thereafter, to-wit, on the 6th day of November, 1906, an election was held, which said election was managed and controlled by persons who were desirous of the carrying of the bonds issued and who desired to and were attempting to confiscate the properties of the plaintiff, and the said persons conducted such election and officers of such election, in disregard of the provisions of law permitted persons residing in the said city of Shawnee to vote upon said proposition and bond issue who did not have real or personal property subject to taxation in the said city, and permit and encourage more than 600 persons in the said city to vote for the said proposition who were not owners of real or personal property in the said city and whom the officers of the said election well knew

48 at the time did not own personal property, and did not require the person voting at such election to be the owner of

real or personal property in the said city, subject to taxation and that a majority of the persons who were the owners of real and personal property or such large numbers of the same within the city subject to taxation voted against such bond issue, and did thereby prevent more than two-thirds of the owners of real and personal property in the city of Shawnee, subject to taxation, approving the said bond issue, but that the said defendants, in disregard of the said law, meet and attempted to canvass the said returns and did declare on the 10th day of November, 1906, that the said bond issue had carried, and did on the 20th day of November, 1906, authorize the issuance of the said bonds, and did advertise for bids for the purchase of the said bonds to be issued under the supposed authority, and will unless restrained by this court issue such bonds and pass the same into the hands of innocent purchasers and take the proceeds thereof, and construct a system of sewers wholly inadequate for the use of the city of Shawnee, and will confiscate the properties of the said plaintiff, without paying any consideration thereof, and will cause levies to be made and taxes to pay the interest and principal of the said bonds and charge the same against the properties of the tax payers of the said city, and against the property of this said plaintiff.

13th. That at the time of the said election there lived in the city of Shawnee, qualified electors under the laws of the said Territory, owning real and personal property subject to taxation, about 2300 electors, who were entitled under the said law to vote at the said election, but by reason of the shortness of the said notice, and the irregularities as aforesaid and the action of the election officials in favoring said bond issue, standing around the polls of the said election and advocating the same, only a small percentage of the said voters, and only 1299 votes were cast upon the said 49 proposition, and a majority thereof were not legal electors possessed of real or personal property subject to taxation in

the said city, and that two-thirds of the qualified electors did not vote affirmatively for the issuance of the said bonds.

14th. That theretofore, to-wit: on or about the 8th day of April, 1906, the said defendants had in due and regular form submitted to the voters of the said city a proposition whether or not bonds should be issued in the sum of \$78,000 for the purposes of building and constructing a sewerage system in the said city of Shawnee, and the said legal and qualified voters of the said city at that time did declare against the issuance of the said bonds and the said defendants, well knowing that the legal and qualified voters of said city did not desire such bond issue, and did not desire to confiscate the properties of the said plaintiff and did not encourage the wrongful acts of the said defendant therein, appointed election officers for the said election on November 6th, and instructed and directed all the officers of the said city to work for the said bond issue, and in the polling places and within fifty feet thereof, did habitually and systematically electioneer with the voters desiring to vote, that they vote for such bond issue, and did encourage persons whom they knew were not qualified voters therein to vote such issue and did count such unqualified votes and did discourage persons who desired to vote at such election against such bond issue from voting at such election, and did thereby procure an apparent majority for such bond issue, and at the same time and in the immediate vicinity of the said places where the said bond election was held, was an election of or for the *the* delegates — Constitutional Convention, and that 1349 votes were cast at such election in the said city, and the said defendants and their officers and agents remained and stayed around the polling places where the said voters were voting upon delegate- for constitutional convention, and encouraged persons who they knew were not qualified voters at such bond election — for delegates, to-wit: residents of the said city who were not owners of real or personal property in said city subject to taxation, to vote at said election, and the judges of the said bond election procured the same to vote, and permitted them to vote upon application and attempted and thereby permitted a large number of persons, to-wit, about 600 to vote at the said election who were not qualified electors under the act of Congress.

15th. Plaintiff further alleges that the said city of Shawnee, the defendant herein, have not the authority under the laws of the Territory and the act of Congress applicable thereto, after granting to the said plaintiff the right to build its said sewer system, and after the construction of the same by the plaintiff, and after the use of the same for more than four years by the said city and the inhabitants thereof, and after the investment of the *the* sum of about \$50,000.00 in such construction to build and construct a sewer system of its own, and have no authority under the said law to in any manner destroy the value of the properties of the said plaintiff and to confiscate the same and to deprive the plaintiff of his vested rights and interests by virtue of the said ordinance without just compensation.

16th. That in pursuance of the said ordinance as aforesaid,

the said plaintiff constructed its said system along the streets and alleys of the said city, following as near as practical for its purposes, the natural drainage of the said city, and did build laterals and connect with the closets of private property in the said city,  
51 and did charge the owners thereof a reasonable consideration for the use of the said sewerage system, which said consideration was fixed by an agreement between the city council and this plaintiff, and that the said city of Shawnee, if permitted to construct its sewerage system, would occupy the same streets and alleys with its mains and laterals and take the same course for its mains to conform to the natural drainage of the said city, and would cause the citizens of the said city to unite with it for the following reasons, to-wit: That all of the citizens of Shawnee would be taxed to build and maintain such sewer system and no other or further consideration would be required, and that the said citizens whose property is now connected with the said plaintiff's system would be taxed to maintain the said sewerage system of the defendants, whether *he* connected therewith or not, and thereby would be compelled and induced to connect with the said system, and all the earning capacity of the plaintiff would be destroyed, and its properties now buried in the ground would be worthless and valueless and the properties of the plaintiff would thereby be destroyed, which properties are now of the aggregate value of not less than \$50,000.00.

17th. That the said city of Shawnee and the said officers thereof, the defendants, herein, ordered the Clerk of the said city to open books for the purpose of permitting the voters of the said city qualified to vote at said election on the said bond issue, who were electors of the said city and who were the owners of real or personal property subject to taxation to register and to certify and determine who were qualified electors of the said city on the said question

52 and the said clerk did permit and qualified voters to register as required by law, and at the times and manner as provided by law, to-wit: The said registration was opened and commenced on the 26th day of September, 1906, and kept open until the 26th day of October, 1906, and there were registered at said election as qualified voters on the said bond issue *and* persons owning real or personal property in the said city and who were electors in the said city the total number of 1711 voters and persons qualified for voting who were electors and the owners of real or personal property in said city subject to taxation, and that in the said election two-thirds of the said voters who were so registered and were on the said November 6th, 1906, qualified voters in the said elect- and the owners of real or personal property subject to taxation in the said city, did not vote affirmatively for the issuance of said bonds and said bonds were not carried, and the said city and its officers were not qualified and authorized to issue the said bonds by the qualified voters of the said city.

18th. That the plaintiff has no adequate remedy at law and will suffer irreparable injury and damage unless the defendants are enjoined from the said wrongful acts.

Wherefore, the premises considered, the plaintiff prays that the said defendants and each of them be temporarily restrained from issuing the said bonds and taking any steps toward the issuance of the same, or selling thereof, and from doing or performing any act or thing toward the construction of the said sewerage system, and that they be restrained from doing or performing any act or thing that would cause a levy to be made upon the properties of the said plaintiff to pay such bond issue, either principal or interest, and that upon final hearing hereof, that such injunction be made permanent and perpetual, and that the defendants be permanently and perpetually restrained from doing or performing any act or things tending to depreciate the properties of the said plaintiff, and from doing or performing any act or thing toward the issuance of bonds, levying taxes to pay the principal or interest thereon, and from the issuance of any such bonds, and for such other relief as the premises justify for costs.

BLAKENEY & MAXEY,  
*Attorneys for Plaintiff.*

TERRITORY OF OKLAHOMA,  
*County of Pottawatomie, ss:*

C. W. Kerfoot, of lawful age, being first duly sworn on oath, deposes and says that he is president of the plaintiff herein, that he has read the above and foregoing petition and knows the contents thereof; that the allegations thereof are true and correct as he verily believes.

C. W. KERFOOT.

Subscribed and sworn to before me this — day of November, 1906.

W. M. ENGART,  
*Notary Public.*

My Commission expires July 12, 1908.

Endorsed: No. 261. Shawnee Sewerage and Drainage Co. vs. Frank P. Stearns, et al. Def'ts. Bill in Equity. Filed July 20, 1908. Harry L. Finley, Clerk. B. B. Blakeney and J. H. Maxey, Jr., solicitors and att'y's for Plff.

54 UNITED STATES OF AMERICA,  
*State of Oklahoma:*

In the United States Circuit Court of the Western District of Oklahoma.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY, a Private Corporation, Complainant,  
vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W.

Wayne, Arthur Dimmers, M. D. Day, J. O. Prouse, G. C. Abernathy, and W. T. Love, Members of the City Council of the City of Shawnee, and the City of Shawnee, a Municipal Corporation, and the Newman Plumbing Company and Walter Newman, Defendants.

*Appearance Entered by the Defendant.*

To the Clerk of the above named Court:

Come now the above named defendants, by P. O. Cassidy and F. H. Reily, their attorneys and solicitors and herewith enter their appearance as defendants in the above entitled action.

P. O. CASSIDY AND  
F. H. REILEY,  
*Solicitors for the Defendants.*

Endorsed: No. 261. Shawnee Sewerage and Drainage Co. vs. F. P. Stearns, et al. Appearance of Defendants. Filed July 20, 1908. Harry L. Finley, Clerk.

55      UNITED STATES OF AMERICA,  
*State of Oklahoma:*

In the United States Court of the Western District of Oklahoma.

THE SHAWNEE SEWERAGE AND DRAINAGE CO., a Private Corporation, Complainant,

vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, and W. T. Love, Members of the City Council of the City of Shawnee, and the City of Shawnee, a Municipal Corporation, and the Newman Plumbing Company and Walter Newman, Defendants.

*Plea to the Jurisdiction of the Court.*

Come now the above named defendants and file this their Plea to the jurisdiction and power of this Court to try, hear, or determine any of the allegations, matters and things contained in the Bill of Complaint of the complainant herein for the following reasons:

First. This Court has no jurisdiction for the reason that the Bill of Complaint in this cause does not show in any of its paragraphs or allegations that the defendants herein have violated or transgressed any of the provisions of the Constitution or laws of the United States, but that in all the acts and doings of the defendants herein in connection with the subject matter of this cause as alleged and set forth in the said Bill, these defendants were acting

wholly within the provisions of both the Constitution and laws of the United States and the Constitution and laws of the State of Oklahoma.

56 Second. The defendants further object to this Court taking jurisdiction of this cause for the following reason:

There is now a suit pending in the District Court of the Tenth Judicial District of the State of Oklahoma in and for Pottawatomie County, said State, in which the identical parties to this action are complainants and the identical parties to this action are defendants, and the subject matter in said suit pending in the District Court of the State of Oklahoma is identical with the subject matter in the suit now before this court, as will appear from the petition filed in the said District Court of the State of Oklahoma and the summons issued thereon, copies of which are attached to this plea, marked Exhibits "A" and "B" and made a part thereof; that in said Petition the plaintiff in that case, complainant in this, alleges the same identical matters that are alleged in the Bill of Complaint in this action, and ask for the same relief, to-wit: an injunction restraining the defendants from proceeding with the construction of the same sewer; that in that action in the state court the plaintiff, the complainant herein, in the absence of the Judge of the District Court from the county, appeared before the County Judge of Pottawatomie County, and procured the issuance by said County Judge of a temporary injunction, a copy of the order granting said temporary injunction being hereto attached, marked Exhibit "C" and made a part of this plea; that thereafter on the second day of July, 1908, the defendants in said action, being the defendants in this action, appeared before the District Judge of said judicial district at his chambers in the City of Shawnee in the County of Pottawatomie and State of Oklahoma, and filed a demurrer to said petition on the grounds that said Petition did not state facts sufficient to constitute a cause of action

57 and also an application to dissolve said injunction, both of which are hereto attached marked Exhibit "D" and "E" and made a part of this Plea; that thereupon the District Judge of said State Judicial District sustained said Demurrer and dissolved said injunction, a copy of the journal entry or order dissolving said injunction being hereto attached, marked Exhibit "F" and made a part of this Plea; that in said order dissolving said injunction the said District Judge allowed the plaintiff, complainant in this case, ninety days to prepare a case made, ten days for amendments and five days to settle the same, and fixed an appeal or supersedions bond at Ten Thousand Dollars to be approved by said Judge, and allowed the plaintiff twenty days to execute said bond, and also gave the plaintiff an exception to said ruling.

Wherefore, These defendants say that whereas an action between the same parties for the same subject matter having been decided by the District Court of the State of Oklahoma, the complainant now is precluded and estopped from bringing an action against the same parties for the same subject matter in this Court, its further proceedings, if it desires to take any, is by appeal to the Supreme Court of the State of Oklahoma, and if not satisfied by the judgment in

that court, to either the Supreme Court of the Court of Appeals of the United States, if a federal question is involved; all of which matters and things the said defendants are ready and willing to aver, maintain and *approve* as this Honorable Court shall direct, and they therefore pray that the complainants' Bill of Complaint be dismissed, and that these defendants be allowed their reasonable costs and charges in this behalf.

P. O. CASSIDY,  
F. H. REILEY,  
*Solicitors for Defendants.*

58      UNITED STATES OF AMERICA,  
*State of Oklahoma, Pottawatomie County, ss:*

On this 18th day of April, 1908, at the city of Shawnee in the County and State aforesaid, personally appeared before me, a Notary Public in and for said county, Frank P. Stearns, who being first duly sworn deposes and says, that he is the Mayor of the City of Shawnee the defendant above named, and that he makes this affidavit on behalf of the said city of Shawnee, and all other defendants councilmen, and that he has read the foregoing Plea and knows the contents thereof, and that the statements therein contained are true of his own knowledge, except as to matters therein stated, on information and belief to those matters he believes them to be true.

FRANK P. STEARNS.

Subscribed and sworn to before me this 18th day of July, 1908.  
[SEAL.]

HAL JOHNSON,  
*Notary Public.*

My commission expires Jan. 22, 1912.

STATE OF OKLAHOMA,  
*Pottawatomie County:*

In the District Court in and for Said County and State.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; Newman Plumbing Company, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, Wm. Wayne, Arthur Dimmers, M. D. Day, J. O. Prouse, G. C. Abernathy, W. T. Love, Members of the City Council of the City of Shawnee, Defendants.

*Petition.*

Comes now the plaintiff in the above entitled action, and complaining of the said defendants and each of them, for cause of action alleges and says:

That plaintiff is a private corporation duly organized under the laws of the State of Oklahoma, and as such private corporation is engaged in the business of constructing, maintaining and operating a system of sewerage in the City of Shawnee, and has been engaged in such business at all the times hereinafter mentioned, and that the City of Shawnee is a municipal corporation organized under the laws of the said state, as a city of the first class and that the Newman Plumbing Company is a corporation organized under the laws of the said state and engaged in the business of maintaining and constructing a sewer system and general plumbing work, with its principal place of business in the City of Shawnee.

60 That on the 22nd day of November 1901, the said City, being then a city of the first class, did, by Ordinance No. 228, grant to De Bruler, Newman & Company, their successors and assigns the privilege for and during the period of fifty years to build, operate and maintain a system of sewerage in the City of Shawnee with necessary y's, branches, man-holes, flush tanks, mains, laterals and other appurtenances essential to the construction and maintenance of the said sewerage system, for the supplying of business houses and inhabitants with a conduit to dispose of all waste water from closets, bath tubs, urinals, lavatories, and for all other purposes both public and private, which said ordinance among other things, provided:

That the said grantees, De Bruler, Newman & Company should enter into a bond of \$1000.00 to be approved by the Council of the said City, for the faithful performance of the duties and obligations imposed upon them by the said franchise, and should commence the construction of the said sewer system on or before the first day of January 1902; that the said ordinance was duly approved by the Mayor of the said City, and was published on the 21st day of November, 1901, in the Shawnee Democrat, a daily newspaper of general circulation in the said City and County, published in the said City, a copy of the said ordinance is hereto attached, marked "Exhibit A" and made a part hereof.

That thereafter to-wit on or about the 28th day of February, 1902, the Mayor and common council of the said City of Shawnee, for the said City of Shawnee passed an ordinance numbered 241, by the terms and conditions of which they amended the said ordinance numbered 228, and provided therein that the said franchise should be granted to De Bruler, Newman & Company, and their successors and assigns for a period of twenty-one years, and did 61 in all things ratify and confirm the provisions of the former ordinance passed, except that the date on which the construction should commence, was extended to the — day of —, 190—; a copy of the said ordinance is hereto attached, marked "Exhibit B" and made a part hereof.

4th. That thereafter to-wit; on or about the 1st day of February, 1902, the said De Bruler, Newman & Company, for a valuable consideration, assigned, transferred and set over to the Shawnee Sewerage & Drainage Company, all of its privileges, rights, immunities, properties, interests in and to their system of sewerage granted to

them under the provisions of the said ordinance above referred to, and all and every ordinance of the City of Shawnee, and that thereafter, to-wit; on the 26th day of February, 1902, the said defendant and the Mayor and City Council of the City of Shawnee, did by ordinance numbered 242, transfer, ratify and confirm the transfer of the rights, privileges, titles and immunities granted to De Bruler, Newman & Company, by the said ordinance No. 241 of the City of Shawnee, from the said De Bruler, Newman & Company to the Shawnee Sewerage & Drainage Company, and did thereby vest the plaintiff with all the interests, titles, rights, privileges and immunities of the said franchises, for the building, constructing, erecting and maintaining a system of sewerage in the City of Shawnee, to the plaintiff in this action, and did by said ordinance authorize and empower the plaintiff to mortgage the said properties, rights and privileges, to secure a sum not to exceed the sum of Twenty-five thousand dollars, and did in the said ordinance provide that the said City should

62 have the option to buy the said system at the exact cost of the construction of the said system, and the costs of labor and material in the construction of the said sewers or any extension thereof, from and after the expiration of fifteen years from the date of the passage of the said ordinance. A copy of the said ordinance is hereto attached, marked "Exhibit C" and made a part hereof.

5th. That by the terms of the said ordinance numbered 228 and the other ordinances numbered 241 and 242, the said De Bruler, Newman & Co., and their successors and assigns, the plaintiffs herein, contracted and agreed to allow the use of the said sewers for city hall, jail, fire department and public watering troughs within the limits of the said sewer system, free of charge, and the said City obligated and bound itself to furnish water to flush the sewers aforesaid free of charge, when in the opinion of the said grantees and their assigns, the plaintiffs herein and the said city council should deem it necessary.

6th. That on or about the 1st day of December, 1901, the said De Bruler, Newman & Co., having heretofore given their bond in the sum of one thousand dollars conditioned as by the said ordinance required and approved by the said City of Shawnee, did commence the construction of the said sewer system, and did continue the said construction until the said transfer aforesaid to the plaintiffs in this action, and the said plaintiff did thereupon continue the construction of the said system and extended its mains and laterals over and throughout the limits of the said City and did expend and invest in such extension the total sum of \$50,000, and did pursuant to the conditions of the said Ordinance No. 242, issue its notes and bonds in the sum of \$25,000, payable 21 years from the date thereof, bearing 6 per cent. interest, and as security for

63 the payment of the said bonds did execute its mortgage upon all of its properties and franchises, situated in the said City of Shawnee to the holder of the said notes and bonds, and did furnish to the said city and did allow the said City the use of its sewers for the city hall, fire department, jail and public watering troughs within the limits of the said sewer system free of charge,

and did connect its said system with the said jail, city hall, and fire department, and did permit the City to erect six watering troughs to connect with the overflow of the same with the said system, and did in all and everything comply with the conditions, duties and obligations imposed by the said ordinances, and is now and has continuously since the said time, maintained the said sewerage system, and has maintained its connections with the city hall, jail, fire department and public watering troughs, and has met all of the demands and necessities of the said City of Shawnee for sewerage purposes and has in all respects and in good faith carried out and observed the terms and conditions of the said ordinances granting to its privileges franchises and immunities as above stated.

That the said plaintiff is the owner of the said property of the aggregate value of about fifty thousand dollars, situated in the City of Shawnee, and on which it is regularly assessed, and pays to the said city, to the said county and to the said Territory, its proper, just and legal taxes upon its said properties, and all of the said taxes imposed by the said city upon the property of the property owners of the city of Shawnee are extended to, charged against and collected from the said plaintiff's property as the plaintiff's interests appear from time to time and as assessed.

64 That on or about the 1st day of December 1901, the said City of Shawnee passed an ordinance, providing that wherever such sewer system should be extended, that all over ground closets should be declared public nuisances and requiring the property owners adjacent to any such extension to connect with the said sewerage system, the said ordinance being passed for the purpose of encouraging the building of the said sewer system by the said grantees and their assigns, the plaintiffs herein, but that immediately after the investment of the said large sums of money in the construction of the said sewer system, the said city repealed the said ordinance, and has habitually and systematically hampered and discouraged and by divers means, attempted to impair the investment of the said plaintiff and to destroy their said property, and to take the same without paying therefor any consideration, well knowing that the plaintiff had invested the said large sum of money upon the faith of the said franchises, and well knowing that the plaintiff had relied upon the privileges and immunities granted by the said ordinances in the making of the said investment, and that the plaintiff had so relying, made its investment as aforesaid, of Fifty Thousand Dollars (\$50,000) and constructed a system of sewers adequate to the necessities, comfort and demands of the said City of Shawnee, and are now and for more than three years last past, have continuously maintained a system of sewers adequate to the necessities, demands and comfort of the inhabitants and citizens of the said City of Shawnee.

That the plaintiff has also issued its bonds and sold the same to divers and numerous innocent purchasers for value, the names of which owners being to the plaintiff unknown, and did secure such bonds by a mortgage on its properties as by the said ordinances permitted.

65 That on the 1st day of October, 1906, the mayor of the said city of Shawnee, in due and proper form, issued a proclamation calling an election and submitting to the voters at an election on the 6th day of November, 1906, the question as to whether bonds should be issued to the sum of One Hundred Sixty-five Thousand (\$165,000.00) Dollars, for the purpose of extending the water works system of said city and for constructing a sewerage system in said City, and that on the said 6th day of November, 1906, said bond issue was duly carried, and bonds in the said sum were duly issued, and the plaintiffs herein did commence an action in the district court of said County and Territory of Oklahoma, and on the 22nd day of December, 1906, said injunctive action came on for hearing, and a decree was then and there rendered adjudging and decreeing that said plaintiff had a legal and valid franchise with the said City of Shawnee, which said judgment and decree provided in substance that the Shawnee Sewerage & Drainage Company had a legal franchise for carrying on the business of operating a sewer system in the City of Shawnee, and that the construction and operation of a sewer system by the city of Shawnee in the immediate vicinity of said sewers, would confiscate the plaintiff's property and depreciate the value of the bonds thereon. And that the Mayor and Councilmen of the said City of Shawnee be and by said decree were enjoined from building or providing a Sewerage system in the vicinity of the plaintiff's said sewer main until after the said plaintiff's sewer main should be condemned or purchased by the said City, a copy of said decree is hereto attached, marked "Exhibit —" and made a part thereof.

That thereafter to-wit on or about the 3rd day of March, 1907 said plaintiff entered into a contract with said defendant, the City of Shawnee which contract provided that said city should buy 66 all of the laterals and sewer pipes of the said plaintiff whenever the same could be used by the said city, a copy of said contract is hereto attached, marked "Exhibit —" and made a part hereof.

That on or about the — day of June, 1908, said defendant in disregard of the rights of the plaintiff, and in disregard of the said judgment rendered in favor of the plaintiffs as aforesaid, against said defendants, marked "Exhibit —" and in disregard of the contract made with said plaintiff, attached hereto, marked "Exhibit —," did enter into a contract with the Newman Plumbing Company, by the terms and conditions of which contract, said defendants gave to the said Newman Plumbing Company, a contract to place the laterals necessary and desired by the said City of Shawnee and its inhabitants, and connect the same with the mains of the said City's sewerage system and did provide by the plans and specifications attached to said contract that the said laterals so contracted to be placed in constructed by the said Newman Plumbing Company, should run down the alleys parallel with and should intersect the mains of the said Shawnee Sewerage & Drainage Company at the same points now occupied and intersected by the laterals of the plaintiff herein, and did thereby contract with the said Newman

Plumbing Company to build the laterals so that the same would tear up and destroy the laterals of the plaintiff herein and its property, when the laterals of the plaintiff herein *was* in all respects proper, adequate and sufficient to accommodate all the mains of the said public, and said plaintiff's laterals were built in and laid in certain alleys, particularly the alley between Ninth and Main Streets from Beard to Oklahoma Avenue in the said city of Shawnee, and said laterals in said alley were so situated that the same were in all respects adequate to accommodate all connections, and were not too shallow in  
67 the ground, but were in the ground a sufficient depth, and complied substantially with all the requirements of the city engineer, but that the said city in disregard of the rights of said plaintiff, refused to accept the same, thereby disregarding said contract and the rights of the said plaintiff.

That said sewer system put in by the said city of Shawnee would be free, and the property of the said city and the inhabitants thereof would be taxed to support and maintain the same, and if said city of Shawnee was permitted to build laterals parallel to said plaintiff's laterals, that all the earnings of the plaintiff's laterals would be terminated because the patrons of the plaintiff would use the public and free laterals of said city which were supported and maintained by their taxation, and that said city by such conduct, would be impairing the obligations of the plaintiff's charter rights and would be appropriating plaintiff's property without due process of law for public purposes and would be confiscating the property of the said plaintiff contrary to the Constitution of the United States and the State of Oklahoma.

Plaintiff alleges that it is a tax payer in said City of Shawnee and pays taxes on a large amount of property, to-wit about Twenty-five Thousand Dollars (\$25000); that the said city council ordered the said laterals to be laid in the said alleys along which the pipes and laterals of the said plaintiff's system are now situated, and is attempting to assess the costs of the same to the property owners without any petition having been filed or signed by the majority of the persons interested, in any district formed in the said city, but arbitrarily and without any authority of law or right, said city is attempting to confiscate and appropriate plaintiff's sewer system, its properties  
68 and laterals by constructing parallel with and on the same side and in the same portions of said alleys, the laterals of the said City and charge the same against the property owners of the city and against plaintiff, without any authority of law, for the purpose of injuring and damaging the said plaintiff — has no adequate remedy at law.

Wherefore plaintiff prays judgment against the defendants and each of them enjoining said defendants and each of them, and particularly the City of Shawnee and said Newman Plumbing Company from constructing within said city of Shawnee any laterals for sewerage connections upon the streets and alleys wherein plaintiff's laterals are now situated and were situated on the 3rd day of March 1907, and from doing and performing any acts or things that tend

to appropriate the property of the said plaintiff without due compensation, and which tends to impair the obligations of the charter contract of the said plaintiff, and such other relief as the premises justify, and for costs.

*Attorneys for Plaintiff.*

69

### EXHIBIT A.

#### *Ordinance No. 228.*

#### An Ordinance Providing for a Franchise to Construct, Maintain, Operate and Own a System of Sewerage in the City of Shawnee, Oklahoma Territory.

Be it ordained by the Mayor and council of the City of Shawnee:

SECTION 1. That De Bruler, Newman & Co., their successors and assigns are hereby granted the privilege for and during the period — fifty years, to build, operate and maintain a system of sewerage in the City of Shawnee, with necessary Y's, branches, man-holes, flush tanks, etc., along certain lines in said city, for supplying the business houses and inhabitants adjacent to said lines with a conduit to dispose of all waste water from closets, bath tubs, urinals lavatories, and for all other purposes both public and private.

SEC. 2. The said De Bruler, Newman & Co. are granted the right to build and construct such sewerage system along the streets and alleys of the said city of Shawnee, upon the following conditions: first that they shall replace all streets and alleys, after the laying of the said sewerage pipes in as good condition as they were before the laying of said pipes. Second, that the work of constructing the said sewerage system shall begin on or before the first day of January, 1902, and the said system shall be completed in the business portion of the said city within five months from the date of beginning the construction thereof.

SECTION 3. Said sewer system shall be constructed out of first class material, and the pipes of sufficient dimensions to carry off all waste water, and during the year of 1902, there shall be a sufficient portion of said system completed and in running operation to supply the needs of all the business portion of the said city, and that from time to time as the business portion of the said city expands, 70 or the inhabitants of the resident portion of the city may desire, sewerage conveniences in such numbers in the opinion of the grantees and the city council as to make it profitable to do so, the grantees agree to extend said sewer system to supply said needs.

SECTION 4. That said grantees are required to keep said sewer system and all extensions thereof in good repair and to save the city harmless from any damage occasioned by reason of leakage or overflow.

SECTION 5. The rates or rentals charged for the use of said sewers to be paid by all parties using the same, shall be such as are charged in other cities for like sewer service, to be determined by the grantees and a committee of three members of the city council.

SECTION 6. The said grantees shall allow the use of the said sewers

for city hall, jail, fire department and public watering troughs within the limits of said sewer system, free of charge.

SECTION 7. The said grantees are prohibited from interfering in the construction of their sewer system, with any water main or service pipe extending from main to curb line.

SECTION 8. The said grantees shall furnish at their own expense all material, supplies and labor for the engineering, constructing, maintaining, extending and improving said sewer system, and the said grantees shall have the exclusive right to tap and extend all sewer connections to property line, But the city binds itself to furnish water to flush said sewers free of charge, when in the opinion of the said grantees and the city council it may be necessary.

71 SECTION 9. At the expiration of fifteen years the city of Shawnee shall have the absolute right to purchase said sewer system from the said grantees, their successors and assigns, if the said city should so desire, at the exact cost of the construction of said system, and in order to keep the city informed of the exact cost of the construction of the said system, the grantees, their successors or assigns, shall furnish the said city a verified, itemized statement of the cost of material and labor in the construction of said sewer or any extension thereto, as soon as the same is completed. But if said city should not desire or conclude to purchase said sewer system at the end of fifteen years, this franchise shall run for the full fifty years from the beginning of the said work, but if at any time after the completion of said sewer system, or any extension thereof, the grantees, their successors, or assigns should totally abandon said system, or allow it to get out of repair, or to get into such condition as to be dangerous to the health or property of the inhabitants of the said city, and to remain in that condition so long as to become a nuisance, the city shall, after notifying the said grantees, their successors or assigns, if within the city, to repair said sewer system, and the failure of said grantees their successors or assigns to do so within a reasonable time, have the right to condemn the same as a nuisance, and either repair the same at the expense of the grantees, their successors or assigns, such expense to be a lien on said sewer system, or to proceed to abate the same as by law provided.

SECTION 10. Before the franchise authorized by this ordinance shall take effect and be of any force, the said De Bruler, Newman & Co. shall enter into a bond to the city of Shawnee, in the sum of one thousand dollars (\$1000.) to be approved by the council of the said city, and for the faithful performance of this franchise.

72 SECTION 11. If the construction of said sewer system is not commenced in good faith on or before the 1st day of January, 1902 then this franchise shall be null and void.

SECTION 12. This ordinance shall take effect and be in force from and after its passage, approval and publication, and the execution and approval of the bond provided for in Section ten (10) of this ordinance.

Passed the City Council and approved this November 22nd, 1901.  
JAMES T. FARRALL, Mayor.

Attest:

J. S. McINTYRE,  
*City Clerk.*

## EXHIBIT B.

*Ordinance No. 241.*

An Ordinance Amending Sections One and Nine of Ordinance No. 2228, Granting to De Bruler, Newman & Co., Their Successors and Assigns, a Contract to Maintain, Operate and Run System of Sewerage in the City of Shawnee, Oklahoma Territory.

Be it ordained by the Mayor and Councilmen of the City of Shawnee:

SEC. 1. That section one of said ordinance No. 228, granting to De Bruler, Newman & Co. a franchise to construct, maintain, operate and run a system of sewerage in the City of Shawnee, be and the same is hereby amended to read as follows:

SECTION 1. That De Bruler, Newman & Co., their successors and assigns are hereby granted the privilege for and during the term of twenty-one years to build, operate and maintain a system of sewerage in the city of Shawnee with necessary Y's, branches, manholes, flush tanks, etc., along certain lines in said city for supplying the business houses, and inhabitants adjacent to said lines with conduits to dispose of all waste water from closets, urinals, bath tubs, lavatories, and for all other purposes, public and private.

SEC. 2. That section nine (9) of said ordinance No. 228 be and the same is hereby amended to read as follows:

SECTION 9. At the expiration of twenty-one years the city of Shawnee shall have the absolute right to purchase said sewer system from the said grantees, their successors and assigns if said city shall desire, at the exact cost of the construction of said sewer system, and in order to keep the said city informed of the exact cost of the construction of said sewer system the grantees, and their suc-

cessors or assigns shall furnish to said city a verified item-  
74 ized statement of the cost of material and labor in the con-

struction of said sewers or any extension thereto as soon as the same is completed, but if the said city should not desire or conclude to purchase said sewer system at the expiration of said twenty-one years, this franchise shall remain in full force and effect until such time as said city shall conclude to purchase same at the terms and on the conditions heretofore set forth in this ordinance, but if the said city shall neglect or refuse to purchase the said system at the expiration of twenty-one years, they shall not have the right to make the election to purchase same, except by and with the consent of the grantees, their successors or assigns, until the period of five years has elapsed after the expiration of the twenty-one years, but if at any time after the completion of said sewer system or any extension thereof, the grantees, their successors or assigns should totally abandon said sewer system or allow it to get out of repair or to become in such condition as to be dangerous to the health of property of the inhabitants of the said city, and to remain in that condition so long as to become a nuisance the city shall, after noti-

lying the grantee, their successors or assigns if within the city, to repair said sewer system, and the failure of the said grantees their successors or assigns to do so within a reasonable time, or if the said grantees their successors or assigns shall be out of the city so that service cannot be had upon them within the city of Shawnee, *the city shall have the right to condemn the same as a nuisance and either repair the same to the expense of the grantees, their successors or assigns. Such expense to be a lien on said sewer system, or proceed to abate the same as provided by law.*

75 SEC. 3. This ordinance shall take effect and be in force from and after its passage, approval and publication and acceptance *on writing* by the Shawnee Sewerage & Drainage Company, successors to De Bruler, Newman & Co.

Passed and approved this 25th day of February, 1902.

Attest:

J. S. McINTYRE,  
*City Clerk.*

The above amendment to ordinance No. 228 and every provision thereof are hereby accepted and approved this 27th day of February, 1902.

SHAWNEE SEWERAGE & DRAINAGE CO.  
By C. W. KERFOOT,  
*President of Co., Successors to De Bruler,  
Newman & Co.*

#### EXHIBIT C.

##### Ordinance No. 242.

An Ordinance Retifying the Transfer of the Franchise Granted by Ordinance No. 228 as Amended by Ordinance No. 241, for the Construction and Maintenance of the System of Sewers in the City of Shawnee from De Bruler, Newman & Co., to the Shawnee Sewerage & Drainage Company, and Authorizing Said Company to Mortgage its Property, Rights and Franchise.

Be it ordained by the mayor and councilmen of the City of Shawnee:

SECTION 1. That the transfer of the rights, privileges, title and immunities granted to De Bruler, Newman & Company by ordinance No. 228, as amended by Ordinance No. 241, of the city of Shawnee, from the said De Bruler, Newman & Co. to the Shawnee Sewerage & Drainage Co. is hereby ratified, confirmed and approved, and the said Shawnee Sewerage & Drainage Co. shall be entitled to all the rights and privileges expressed in said ordinance as fully as though granted directly to the said Shawnee Sewerage & Drainage Co., and shall be and remain under all duties and obligations thereby imposed upon the said De Bruler, Newman & Co. with like effect as if said privileges had been granted originally to the Shawnee Sewerage & Drainage Co.

SECTION 2. The said Shawnee Sewerage & Drainage Co. is hereby authorized to borrow the sum of twenty-five thousand dollars (\$25,000) and to execute mortgage or deed of trust to secure the same on its properties, rights and franchises in the city of Shawnee at a rate of interest not exceeding six per cent. per annum and for a period of time not to exceed 21 years to secure the payment of the said loan. Providing that the making of such loan shall not

77 interfere with the right of the city of Shawnee to *to* purchase said plant at any period prescribed in ordinance No. 228 as amended by Ordinance No. 241, and that the said City may at its option call said bonds at such period and deduct the amount thereof from the price to be paid to the said Shawnee Sewerage & Drainage Co., its successors and assigns, or may continue said bonds in force to their maturity and to deduct the same from the price to be paid to the said company, its successors or assigns. And provided further that unless the city of Shawnee should elect to purchase said plant subject to said bonds and mortgage, and continue the same in force and under no other circumstances shall the city of Shawnee be liable for the payment of the said bonds or any part thereof.

SECTION 3. This ordinance shall be in force and effect from and after its passage, approval and publication.

Passed this 26th day of February, 1902.

J. S. McINTYRE,  
*City Clerk.*

Approved this 26th day of February, 1912.

JAMES T. FARRALL, *Mayor.*

#### EXHIBIT D.

TERRITORY OF OKLAHOMA,  
*County of Pottawatomie:*

In the District Court in and for said County and Territory.

SHAWNEE SEWERAGE & DRAINAGE CO., a Corporation, Plaintiff,  
vs.

J. M. AYDELOTTE, as Mayor; CHARLES J. BECKER, as City Clerk, and John Lain, William Reid, R. H. Clayton, J. A. Farris, T. B. Hogg, F. M. Blakeley, Arthur Dimmers, John W. Atterbury, Sidney Clarke, Jr., P. E. Noll, J. H. Pemberton, and Hal Johnson, as Councilmen of the City of Shawnee, a Municipal Corporation, Defendants.

*Decree.*

On this the 22nd day of December, 1906, the same being a regular day of the September 1903 term of the district court in and for the said County and Territory, and the above entitled cause being regularly set for trial on the said day and date, and the plaintiff appear-

ing by its attorneys, Blakeney & Maxey, and the defendants, J. M. Aydelotte, as mayor, Charles J. Becker as city clerk and John Lain, William Reid, F. M. Blakeley, T. B. Hogg R. H. Clayton, J. A. Farris, John W. Atterbury, Arthur Dimmiers, Sidney Clarke, Jr., P. E. Noll, J. H. Pemberton and Hal Johnson, councilmen of the city of Shawnee, appearing by their attorney F. H. Reilly and the City of Shawnee, a municipal corporation appearing by its duly elected, qualified and acting city attorney, and thereupon the plaintiff and each of the defendants announced ready for trial, and the court after hearing argument of counsel and being fully advised in the premises upon the facts of the law, finds as follows:

79 That the plaintiff is a private corporation duly organized under the laws of the Territory of Oklahoma, and is at this time engaged in the business of owning and operating a system of sewerage in the city of Shawnee, Oklahoma Territory, under and by the authority of an ordinance of said city of Shawnee, duly and legally granted to De Bruler-Newman & Company and transferred to plaintiff; that under said franchise ordinance the plaintiff among other things constructed a main sewer from a point beginning at the north edge of the man hole in Philadelphia Avenue in the city of Shawnee which point is one hundred — fifty (150) feet north of the north line of Main street, thence south along Philadelphia Avenue six hundred eighty-three & 40/100 (683.4) to Seventh Street; thence east on Seventh street three hundred fifty-two (352) feet to Oklahoma Avenue; thence south along Oklahoma Avenue and the projection thereof four thousand two hundred seventy (4270) feet to the north side of the north fork of the Canadian River, together with certain man-holes, connections and bulk heads, which said main sewer follows the principal course of drainage and that said main sewer is now of the value of six thousand nine hundred (\$6900) dollars; the court further finds that by lawful transfer thereof and by due ratification by the city of Shawnee is the legal owner and holder of the said franchise and all the rights granted thereunder and the owners of the said main sewer as above described, together with the man-holes, bulk heads, connections and right of way through which the said sewer runs; the court further finds that the plaintiff has sold its bonds to innocent purchasers to raise money for the purpose of constructing said sewer.

The court further finds that on the first day of October, 1906, the city of Shawnee, by an ordinance duly and legally enacted by the

80 mayor and councilmen in regular session, authorized and empowered the mayor and the city of Shawnee to issue his proclamation calling a special election to vote upon the question of the issuance of bonds to the sum of one hundred and sixty-five thousand dollars (\$165,000.00) for the purpose of securing funds to pay for the construction of sewers for sanitary and health purposes and for construction, reconstruction and extention of water-works in the City of Shawnee, said bonds to run for a period of thirty (30) years from the date of their issuance and to contain all necessary conditions as to form, and to bear interest at the rate of not to exceed six (6) per cent. per annum, said interest to — paid semi-annu-

ally and none of the said bonds to be sold for less than par; the said court further finds that the said ordinance, which was numbered 500, was legally published as by law required, in the Shawnee Herald, a newspaper of general circulation in the City of Shawnee, and was in full force at the time of the issuance of a proclamation calling said special election.

The court further finds that on the 5th day of October, 1906, the mayor of the City of Shawnee issued his proclamation calling a special election for the 6th day of November, 1906, in due and regular form, and in conformity with the provisions of said ordinance No. 500, submitting to the qualified electors and owners of real or personal property subject to taxation within said city of Shawnee the question of the issuance of bonds for the construction and cost of sanitary sewers, and for the construction, reconstruction and extention of the water-works and that the same be published as by law required.

The Court further finds that in conformity with the said election proclamation at the time and date therein provided, said special election was duly and legally held, carried on and conducted as

by law provided and that no one voted at the said election  
81 but qualified electors within the city of Shawnee and owners  
of real or personal property subject to taxation within the city  
of Shawnee and that more than two-thirds of the qualified electors  
and owners of real or personal property within the City of Shawnee  
voted in the affirmative on the said proposition and that the mayor  
and councilmen were thereby authorized to issue said bonds in the  
amount and for the purposes therein stated.

It is therefore by the court considered and adjudged that the plaintiff, the Shawnee Sewerage and Drainage Company, has a legal franchise of carrying on the business of operating a sewer system in the City of Shawnee, and that the construction and operation of a sewer system by the City of Shawnee in the immediate vicinity of said sewer, would confiscate the plaintiff's property and depreciate the value of the bonds thereon.

It is further considered and ordered by the court that Ordinance No. 500, of the City of Shawnee, entitled, "An Ordinance calling an election in the City of Shawnee, Pottawatomie County, Oklahoma, for the purpose of voting upon the question of the said City issuing bonds in the sum of \$165,000, the money to be derived from the sale of such bonds to be used for the purpose of constructing sewers for sanitary and health purposes and for the construction, reconstruction and extention of the water-works," was legally enacted by the mayor and councilmen of the City of Shawnee and approved by the mayor thereof on the 4th day of October 1906, and published as by the law required, and is legal and binding and in full force and effect.

It is further considered and adjudged by the court that the proclamation of the mayor, issued in pursuance of Ordinance No. 500, and was in legal form and authorized the holding of the said special election on the 6th day of November, 1906, and was in due and legal form.

82 It is further considered and adjudged that the form of ballot authorized in said proclamation and used in said election was in all respects legal.

It is further considered and adjudged that there were 1299 qualified electors who were owners of real and personal property subject to taxation within the City of Shawnee on the 6th day of November, 1906, and that 1080 of the said electors voted in the affirmative at the said election and that 219 electors voted in the negative and that more than two-thirds of the said qualified electors who were owners of real or personal property subject to taxation in the City of Shawnee, voted in the affirmative and that said question submitted in said proclamation was carried and that said election was conducted as provided by law.

It is further considered and adjudged that the said mayor and councilmen were and are hereby authorized to issue the said bonds of the said city in the sum of one hundred sixty-five thousand dollars (\$165,000) to run for thirty (30) years from their date of issuance and bearing interest not exceeding six percent. per annum and to be sold for not less than par.

It is further adjudged and decreed that the mayor and councilmen of the City of Shawnee, be and they are hereby enjoined from building or providing a sewerage system in the vicinity of the plaintiff, said sewer main as herein described until after plaintiff's said sewer main shall be condemned or purchased by the city of Shawnee.

It is further considered, ordered and adjudged by the court that the provisions of the act of March 4th, 1898, which is entitled "An Act to amend an act to prohibit the passage of local or special laws in the Territories, to limit Territorial indebtedness, etc." have been in all respects duly and strictly complied with and that bonds

83 ought to be issued by the City of Shawnee and the said mayor and the Councilmen thereof within the terms and authorized by said act and are for sewers, for sanitary and health purposes and the construction, reconstruction and the extension of the water-works system and that the said ordinance No. 500, passed as aforesaid by the mayor and the councilmen, the notice and proclamation of election given in pursuance of its terms and the election held thereunder were all and each of them in compliance with all the terms and provisions of the said act, and that the said election held thereunder and in compliance with said ordinance and proclamation was in all respects properly held and conducted, and that the said mayor and councilmen were authorized and empowered to issue the bonds of the said city of Shawnee containing the ordinary terms and conditions, showing the compliance with the said act of Congress as aforesaid, and of the laws of the Territory of Oklahoma, in the sum of \$165,000.00 for the purpose of constructing the said sewer system and water-work extension, construction and reconstruction, as herein provided.

It is further considered and adjudged that in the event that the city of Shawnee condemns or purchases the main sewer as hereinbefore described, from the plaintiff herein, that the said city of Shawnee, and its mayor and councilmen are hereby enjoined from

preventing the said plaintiff from connecting with main sewer free of charge and to use the same by such connections, all the district sewers and laterals belonging to the plaintiff in operation within said city at the date of the rendition of this judgment.

It is further considered and ordered that the temporary restraining order herein granted on the 4th day of December, 1906, be and the same is set aside and held for naught, and that the plaintiff recover of defendants herein all costs in this behalf expended, for which let execution issue.

**"EXHIBIT E."**

This memorandum of agreement made and executed in duplicate this the — day of March, 1907, as an agreement embodying the terms of settlement between the Shawnee Sewerage & Drainage Company, as party of the first part, and the committee appointed by the city council of the city of Shawnee, to adjust the difference existing between the said party of the first part and the party of the second part, and to effect a settlement of the litigation and claim arising out of such matters;

Witness: That the party of the second part has entered into an agreement with the party of the first part which the party of the second part shall submit to the city council of the city for its approval and adoption, as follows, to-wit: that for and in consideration of the sum of \$6900.00 and all stipulations hereinafter set forth, the party of the first part does hereby sell and transfer to the said city of Shawnee all of its mains line of sewer beginning on the north bank of the Canadian river in section thirty, township ten north, range four east of the I. M., extending north to the corner of 7th and Oklahoma streets; running thence went on Seventh Street to the corner of Philadelphia; thence north to the alley north of Main Street on Philadelphia Avenue and the further stipulation as follows: That the party of the second part shall and will recognize the rights of the party of the first part then owners of certain laterals now laid in the said city, and the said party of the second part shall at the time the said city shall be districted into sewer districts for the purpose of laying and constructing laterals in the said

sewer district, the said city shall cause said laterals of the  
85 said party of the first part to be appraised in case agreement

cannot be had as to the price thereof, by the appointment of a commission, one to be selected by the city, one to be selected by the party of the first part, and one to be selected by the person owning property to be affected, which said parties shall fix the price of said laterals and said city shall then use all lawful means to tax up said laterals, at the price agreed upon to the abutting property, and deliver the tax warrants until the party of the first part, which shall be in full payment for such lateral, in so far as the abutting property is concerned, and the city shall not be liable as for the payments of said warrants, and it is understood that said city does not attempt to bind itself any further than warranted and permitted by law. It is further agreed that said party of the

second part shall not build any new laterals up any alley in which the laterals of the party of the first part are now situated, unless said laterals as now existing are inadequate to accommodate connections. If said laterals belonging to the party of the first part cannot be used for connection on account of its being too shallow in the ground, or for any other reason, then same shall not be considered in this agreement, and said city shall have the right to construct other laterals in the place thereof, or to repair and deepen the said laterals belonging to the party of the first part at its expense and then proceed as above set forth.

It is further stipulated and agreed by and between the parties hereto that the said party of the first part shall have the privilege of connecting its pipes and laterals now located in the City of Shawnee with the mains of other laterals that may at any time be owned by the said city until such time as the said city shall purchase as herein stated, the properties of the party of the first part, free from charge and without restriction.

86 In witness whereof the parties have hereunto set their hands in duplicate this 3rd day of March, 1907.

SHAWNEE SEWERAGE & DRAINAGE CO.,  
By C. W. KERFOOT, *President.*

J. W. ATTERRBURY,  
R. H. CLAYTON,  
WM. REID,  
*Council Committee.*

87 Ex. B.

*Summons—District Court.*

STATE OF OKLAHOMA,

*Pottawatomie County, ss:*

The State of Oklahoma to the Sheriff of Pottawatomie County,  
Greeting:

You are hereby commanded to notify Frank Stearns, Mayor of the City of Shawnee, A. D. Martin, City Clerk of the City of Shawnee, Newman Plumbing Company, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, Wm. Wayne, Arthur Dimmers, M. D. Day, J. O. Prouse, G. C. Abernathy, W. T. Love, Members of the City Council of the City of Shawnee, that they have been sued by Shawnee Sewerage and Drainage Co. in the District Court of Pottawatomie County, Oklahoma, and they must answer the petition of said plaintiff Shawnee Sewerage and Drainage Co. filed against them in the Clerk's office of said Court on or before the 29 day of July 1908 or said petition will be taken as true and judgment will be rendered accordingly.

You will make due return to this summons on or before the 9 day of July 1908.

Given under my hand and the seal of said Court this 29 day of July 1908.

[SEAL.] J. G. HUDIBURG, *District Clerk,*  
By J. D. SEAY, *Deputy.*

Copy. Case No. 4360. Summons. Shawnee Sewerage & Drainage Co. Plaintiff. Frank Stearns Mayor, Defendant, et al. Issued June 29, 1908. Returnable July 9, 1908. Answer due July 29, 1908. B. B. Blakeney, Attorney for Plaintiff. I do hereby certify that the within to be a true copy of the original summons now in my possession with all the endorsements thereon. E. A. Pierce, Sheriff, by A. D. King, Deputy. Suit brought for Injunction. Injunction allowed and cost of suit. J. G. Hudiburg, Clerk. By J. D. Seay, Deputy.

## Ex. C.

STATE OF OKLAHOMA,  
*Pottawatomie County, ss:*

In the District Court Thereof.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; Newman Plumbing Company, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelpfrey, J. A. Farris, J. B. Springer, Wm. Wayne, Arthur Dimmers, M. D. Day, J. O. Prouse, W. T. Love, G. C. Abernathy, Members of the City Council of the City of Shawnee.

*Order.*

The above entitled matter coming on for hearing before me Judge of the County Court of said County and State, and it being made to appear to me that the Hon. W. N. Maben, Judge of the District Court is absent from the said County, and from an examination of the verified petition and other proof offered by the said Plaintiff, that said plaintiff is entitled to a temporary restraining order restraining and enjoining said defendants and each of them from doing or performing any act or thing that shall in any manner affect the properties and laterals of the said plaintiff, and that said defendant ought to be enjoined from making contracts with any person or corporation authorizing the said contractors to lay in the streets and alleys of the said City of Shawnee, laterals in which said streets or alleys the property and laterals of the plaintiff are situated, and which said laterals would in any respect comply with the requirements of the city engineer, and it appearing to me that the mayor and city council of the city of Shawnee is about to enter into a contract with the Newman Plumbing Company to build such laterals and place the same in the streets and alleys of said city and to

place the same in the streets and alleys occupied by the laterals  
of the said plaintiff, which under the contract between the  
9 said plaintiff and the city of Shawnee, said city has obligated  
itself to accept and purchase.

Now therefore, it is hereby ordered that the mayor and members of the city council of said city of Shawnee, be and each of them and the city clerk of said city be and he is hereby enjoined and restrained from the doing or performing of any act which in any manner interferes with the sewers and laterals of the plaintiff now situated and which were on the 3rd day of March, 1907, situated in the streets and alleys of the said city of Shawnee, and from in any manner laying or constructing or attempting to lay or construct any laterals or sewers in the streets and alleys wherein plaintiff's laterals are now situated, and from in any manner interfering with the property of the said plaintiff and particularly be and they are hereby enjoined from entering into any contract with the Newman Plumbing Company for the laying and construction of such laterals and said Newman Pulmbing Company be and is hereby restrained and enjoined from in any manner attempting to construct or lay in any of the alleys or streets in said city of Shawnee -here the properties, laterals or sewers of said plaintiff are now located, without first acquiring by law the property of the said plaintiff located in such streets and alleys.

It is further ordered that said plaintiff shall execute a bond in the sum of \$1000.00 conditioned as by law required, to be approved by the clerk of the District Court, and that this restraining order shall have force and effect after the filing and approval of said bond.

It is further ordered and adjudged that said defendants shall be and appear before the Hon. W. N. Maben, Judge of the District Court in his chambers at Shawnee on the 16 day of July, 1908,  
9 and that said order shall continue in force until said date,  
and shall continue in force thereafter as a temporary injunction until a hearing shall be had by the said District Judge.

Witness my hand at Tecumseh this 29th day of June, 1908.  
[SEAL.] E. D. REASOR,  
*County Judge.*

Endorsed: No. 4360. Shawnee Sewerage & Drainage Co. vs. Frank P. Stearns, Mayor, et al. Order filed in District Court Potawatomie County. June 29, 1908. J. G. Hudiburg, Clerk, by J. D. Seay, Deputy.

In the District Court of Pottawatomie County, State of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; Newman Plumbing Company, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Fariss, J. B. Springer, William Wayne, Arthur Dimmers, M. D. Day, J. P. Prouse, W. T. Love, G. C. Abernathy, Members of the City Council of the City of Shawnee, Defendants.

*Demurrer.*

Comes now the above named defendants by P. O. Cassidy, and demurs to the Petition of the plaintiff filed herein for the reason that the same does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

P. O. CASSIDY,  
*Attorney for Defendants.*

In the District Court of Pottawatomie County, State of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; Newman Plumbing Company, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Fariss, J. B. Springer, William Wayne, Arthur Dimmers, M. D. Day, J. O. Prouse, W. T. Love, G. C. Abernathy, Members of the City Council of the City of Shawnee.

*Application to Dissolve Temporary Injunction.*

Comes now P. O. Cassidy, City Attorney of the City of Shawnee and attorneys for all defendants, and moves the Honorable W. N. Maben, Judge of the said District Court, at Chambers, to dissolve the temporary injunction granted by the County Judge of Pottawatomie County in the above entitled cause on the 29th day of June, 1908, and for cause thereof states, that said Petition does not state facts sufficient to constitute a cause of action or to warrant the granting of a temporary injunction; and the application for a temporary injunction was not made in good faith to the County Judge as Honorable W. N. Maben, Judge of the District Court, was only absent from the County of Pottawatomie one day.

P. O. CASSIDY,  
*Attorney for Defendants.*

## Ex. F.

In the District Court of Pottawatomie County, State of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; Newman Plumbing Company, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farriss, J. B. Springer, William Wayne, Arthur Dimmers, M. D. Day, J. O. Prouse, W. T. Love, G. C. Abernathy, Members of the City Council of the City of Shawnee, Defendants.

*Order.*

On this second day of July, 1908, the above named defendants appeared before me by P. O. Cassidy, at Chambers in the City of Shawnee, and presented their application to dissolve the temporary injunction granted by the County Court of Pottawatomie County, State of Oklahoma, on the 29th day of June, 1908, for the reason that the Petition filed in said case does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants, and on reading said application and the demurrer filed herein to said Petition, and being fully advised in the premises, the court finds that under the allegations of said Petition a temporary injunction should not have been granted by the County Judge of said County and State.

It is therefore ordered and adjudged that said temporary injunction be and the same is hereby dissolved and set aside, to which ruling the plaintiff excepts, and plaintiff has ninety days to prepare a case-made, ten days for amendments and five days to settle same, and plaintiffs must execute a supercedious bond in the amount of Ten Thousand (\$10,000) Dollars to be approved by W. N. Maben, Judge of said District Court, within 20 days.

W. N. MABEN, *Judge.*

94      Endorsed: No. 261. Shawnee Sewerage and Drainage Co. vs. F. P. Stearns, et al., Plea to Jurisdiction. Filed July 20, 1908, Harry L. Finley, Clerk.

95      UNITED STATES OF AMERICA,  
*State of Oklahoma.*

In the United States Court of the Western District of Oklahoma.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY, a Private Corporation, Complainant,  
vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farriss, J. B. Springer, J. W.

Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy and W. T. Love, Members of the City Council of the City of Shawnee, and the City of Shawnee, a Municipal Corporation, and the Newman Plumbing Company, and Walter Newman, Defendants.

*Demurrer to Complainant's Bill of Complaint Praying for an Injunction.*

Come now the above named defendants Frank Stearns, Mayor of the City of Shawnee, A. D. Martin, City Clerk of the City of Shawnee, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy and W. T. Love, members of the City council of the city of Shawnee, and the City of Shawnee, a municipal corporation, and the Newman Plumbing Company, and Walter Newman, and by protestation not confessing or acknowledging all or any of the matters and things in said Bill of Complaint contained to be true, demur to said Bill and the whole thereof, and for cause of demurrer shows—

First. That the allegations in the Bill in this cause are insufficient in law to entitle the complainant to any relief.

Second. For a further cause of demurrer these defendants show that this court has not jurisdiction to try and determine the matters and facts alleged in and set forth in the bill of complaint in this cause, for the reason that the Bill does not show that any provision of the Constitution or laws of the United States has been violated by these defendants, and the allegations of the Bill further show that in doing the things which the Bill of Complaint charges them with doing, these defendants were acting wholly within the constitution and laws of the United States and the Constitution and laws of the State of Oklahoma.

Third. And for a further cause of demurrer these defendants show that the complainant is not entitled to sustain said bill for the reason that it has a full, complete and adequate remedy at law.

Wherefore, the defendants demur to the said bill and to all the matters and things therein contained and prays the judgment of this Honorable Court whether they shall be compelled to make any further or other answer thereto, and prays to be dismissed with a reasonable costs in their behalf.

P. O. CASSIDY,  
F. H. REILEY,  
*Solicitors for Defendants.*

I certify that in my belief the foregoing demurrer of said above-named defendants to the Bill of Complainants, the Shawnee Sewerage & Drainage Company, is well founded in law and proper to be filed in the above cause.

P. O. CASSIDY,  
F. H. REILEY,  
*Solicitors for Defendants.*

97 UNITED STATES OF AMERICA,  
*Western District of Oklahoma, ss.*

Frank P. Stearns, Mayor of the said defendant the City of Shawnee, and who makes this affidavit on behalf of the said defendant the City of Shawnee, and all other defendants who are councilmen of said City, and Walter Newman, President of the Newman Plumbing Company and himself a defendant, and who makes this affidavit on behalf of the Newman Plumbing Company and for himself, on oath, say each for himself, that he has read the foregoing demurrer to the Bill of Complaint of the above named complainant filed in the above entitled cause, and that the same is not interposed for the purpose of delaying the said suit or further proceedings therein.

F. P. STEARNS.  
W. NEWMAN.

Subscribed and sworn to before me this 18th day of July, 1908.

[SEAL.]

W. J. RIGGS,  
*Notary Public.*

My commission expires Dec. 12, 1911.

Endorsed: No. 261. Shawnee Sewerage and Drainage Co. vs. F. P. Stearns, et al. Demurrer to Bill of Complaint. Filed July 20, 1908. Harry L. Finley, Clerk.

98 In the Circuit Court of the United States for the Western District of Oklahoma.

In Equity. No. 261.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY  
vs.  
FRANK STEARNS et al.

*Order.*

Now on this 10th day of August, 1908, the application of the complainant for a temporary injunction, having been heretofore submitted and fully considered comes on to be determined by the Court, and it duly appearing that there is a prior suit pending in the District Court of Pottawatomie County, in this state, between the same parties wherein the same relief, to-wit: an injunction is prayed relative to the subject of the action, and due cause being shown,

It is ordered by the Court that a determination of said application for a temporary injunction be and the same is postponed and stayed pending said former suit or until the further order of this court.

To said order and ruling the complainants and defendants and each of them at the time duly excepted and except.

It is so ordered.

JOHN H. COTTERAL, *Judge.*

Endorsed: Filed Aug. 16, 1908. Harry L. Finley, Clerk.

99 STATE OF OKLAHOMA,  
10th Judicial District, Pottawatomie County, ss:

In the District Court in and for Said County, District and State.

THE SHAWNEE SEWERAGE & DRAINAGE COMPANY, a Corporation,  
Plaintiff,  
vs.  
THE CITY OF SHAWNEE et al., Defendants.

Comes now the plaintiff in the above entitled action by its attorneys, B. B. Blakeney and J. H. Maxey, Jr., and dismisses the above entitled action without prejudice at the plaintiff's cost.

B. B. BLAKENEY &  
J. H. MAXEY, JR.,  
*Attorneys for Plaintiff.*

In the District Court,

STATE OF OKLAHOMA,  
*Pottawatomie County, as:*

I, J. G. Hudiburg, Clerk of the District Court in and for the above named county, and state hereby certify that the above and foregoing is a full, true, correct and complete copy of the original Dismissal in case No. 4360, same being entitled Shawnee Sewerage & Drainage Company, a corporation, plaintiff, vs. The City of Shawnee et al., Defendants as fully as the same appears on file and of record in this office.

Witness my hand and official seal this the 13th day of Aug. 1908.  
[SEAL.] J. G. HEDIBURG, Clerk.

100 Endorsed: No. 261. Shawnee Sewerage Co. vs. Stearns, et al. Dismissal. Certified Copy. Circuit Court of the United States Western District of Oklahoma. Clerk's Office. Filed Aug. 15, 1908. Harry L. Finley, Clerk.

101 In the Circuit Court of the United States for the Western District of Oklahoma.

No. 261. In Equity.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY, a Private Corporation, Plaintiff,

vs.  
FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jessie Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, and W. T. Love, Members of the City Council of the City of Shawnee, and The City of Shawnee, a Municipal Corporation,

and The Newman Plumbing Company & Walter Newman, Defendants.

*Order.*

Now on this 15th day of August, 1908, the application of the complainants for a temporary injunction is reassigned for hearing at the Federal Court Room, in Guthrie, at 10 o'clock, A. M, on August 20th, 1908.

JOHN H. COTTERAL, *Judge.*

Endorsed: No. 261. Shawnee Sewerage and Drainage Co. vs. Frank Stearns, Mayor et al. Order, assigning application for Temporary injunction for hearing. Filed Aug. 15, 1908. Harry L. Finley, Clerk.

102 UNITED STATES OF AMERICA,  
*Western District, State of Oklahoma, ss:*

In the United States Circuit Court of the Western District of the State of Oklahoma.

THE SHAWNEE SEWERAGE & DRAINAGE COMPANY, a Private Corporation, Plaintiff,  
vs.  
THE CITY OF SHAWNEE et al., Defendants.

*Notice.*

The said defendants and each of them will take notice that the plaintiff herein will ask leave on Monday, August 17th, 1908, in open court of the Honorable John H. Cotteral to file the attached amendment to bill in equity in the above styled case and will also ask leave to file a certified copy of dismissal which has heretofore been filed in the case of the Shawnee Sewerage and Drainage Company vs. The City of Shawnee, et al. which was pending in the District Court of the State of Oklahoma at Tecumseh.

J. H. MAXEY, JR., &  
B. B. BLAKENEY,  
*Attorneys for Plaintiff.*

Service of copy of the above notice together with copy of the amendment to bill in equity, and copy of dismissal has been accepted this 15th day of August, 1908.

P. O. CASSIDY,  
*Attorneys for Defendants.*

Endorsed: #261. Notice and Acceptance of Service. Filed Aug. 20, 1908. Harry L. Finley, Clerk.

103 In the Circuit Court of the United States, Western District of Oklahoma.

In Equity. No. 261.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY, a Private Corporation, Plaintiff,

vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Days, J. O. Prouse, G. C. Abernathy and W. T. Love, Members of the City Council of the City of Shawnee, and The City of Shawnee, a Municipal Corporation, and The Newman Plumbing Company and Walter Newman, Defendants.

*Order.*

Now on this 20th day of August, 1908, comes the complainant herein by its attorneys B. B. Blakeney and J. H. Maxey, Jr. and comes the defendants by their attorneys P. O. Cassidy and W. N. Engart. Thereupon it is ordered that the order previously made to-wit: on the 15th day of August, 1908, re-assigning the hearing for a temporary injunction herein for this August 20th, 1908, be and the same is for want of a formal application therefor hereby vacated and set aside.

It is further ordered, on application of complainant, that complainant be, and it is hereby, given leave to file an amendment to their bill of complaint herein, setting forth more specifically and fully the amount involved in this action, and praying for a temporary injunction against the defendant herein, pending the final hearing of this cause, and praying that a writ of subpœna be issued for said defendants. To which order and ruling granting complainant leave to file amended bill herein, the defendants duly except.

104 Done in chambers, at Guthrie, Oklahoma, this 20th day of August, 1908.

JOHN H. COTTERAL, *Judge.*

Endorsed: No. 261. Shawnee Sewerage & Drainage Co. vs. Frank Stearns, et al. Order. Leave Compl't to file amended bill. Filed Aug. 20, 1908. Harry L. Finley, Clerk.

105 UNITED STATES OF AMERICA,  
*State of Oklahoma, Western District, ss:*

In the United States Circuit Court of the Western District of Oklahoma.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY, a Private Corporation, Plaintiff,

vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy and W. T. Love, Members of the City Council of the City of Shawnee and The City of Shawnee, a Municipal Corporation, and The Newman Plumbing Company and Walter Newman, Defendants.

*Amendment to Bill in Equity.*

To the Honorable Circuit Judges of the Circuit Court of the United States in and for the Western District of the State of Oklahoma:

The Shawnee Sewerage and Drainage Company, plaintiff by leave of the court in *their* behalf first had and obtained brings this amendment of its bill of complaint against the said respondents, Frank Stearns, Mayor of the City of Shawnee, A. D. Martin, City Clerk of the City of Shawnee, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy and W. T. Love, members of the City Council of the City of Shawnee, and the City of Shawnee a municipal corporation, The Newman Plumbing Company, and Walter Newman, and thereupon your orator complains and makes amendment of its said bill of complaint herein as follows:

106 1st. Preceding paragraph No. 3 found in said bill on page 2 and immediately following the words "City of Shawnee" found in line 7 of said second page and as a separate paragraph No. 2 1/2 insert.

That there is now and was at the commencement of said action, involved in said action more than two thousand dollars exclusive of interest and costs and that there was in fact involved in said action the value of the system, pipe and laterals, of the complainant to-wit: the sum of thirty thousand dollars as in said original bill herein shown.

2nd. To insert after the paragraph No. 24 of said original bill on page 14 thereof after the 17th line thereof a prayer as follows:

Wherefore your orator prays as it has heretofore prayed in its original bill of complaint. And further that the said defendants and each of them be enjoined from doing or performing any act or thing and from doing and performing all and singular the acts

and things alleged in said bill tending to appropriate without compensation the property of this complainant and that pending the final hearing of said bill, a temporary injunction be issued herein, and that the said temporary injunction decree and enjoin the said defendants and each of them from constructing within the said city of Shawnee laterals or sewers and laying pipes in such streets and alleys of said city where plaintiff's laterals and pipes are now situated and were situated on the 3rd day of March, 1908, and from doing or performing anything that tends to appropriate the property of the said plaintiff without due compensation or which impairs the obligations of the contract of the parties or deprives your orator of his property without due process of law, and that a writ of subpoena of the United States of America be issued to each of the said defendants, Frank Stearns, Mayor of the City of Shawnee, A. D. Martin, City Clerk of the City of Shawnee, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy and W. T. Love, members of the City Council of the City of Shawnee, and the City of Shawnee, a municipal corporation, and the Newman Plumbing Company, and Walter Newman, commanding them and each of them to appear on the said date to answer unto this bill of complaint and to perform such order and decree in the premises as to the court seems proper and required by the principles of equity and good conscience, and that said defendants and each of them be required to answer in the said action but not under oath, and that upon the final hearing thereof such preliminary injunction be made perpetual so that the property right of the complainant as herein stated shall be preserved and protected as provided by the Constitution and laws of the United States.

J. H. MAXEY, Jr., &  
B. B. BLAKENEY,  
*Solicitors for Complainants and of the Council.*

UNITED STATES OF AMERICA,  
*Western District of Oklahoma:*

On this the 10th day of August, 1908, before me personally appeared C. J. Benson, Secretary of the Shawnee Sewerage and Drainage Company and familiar with its business and says that he has read the foregoing amendment to the bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as — the matter- therein stated on information and belief and as to those matters he believes it to be true.

C. J. BENSON.

108      Affirmed and subscribed to before me this the 10th day of August, 1908.

[SEAL.]

L. WHEELER,  
*Notary Public for Pottawatomie County,*  
*State of Oklahoma.*

My Commission expires Feb. 23, 1910.

Endorsed: No. 261. Shawnee S. & D. Co. vs. Frank Stearns, et al. Amended Bill. Filed Aug. 20, 1908. Harry L. Finley, Clerk.

109 In the United States Circuit Court for the Western District of Oklahoma.

In Equity. No. 261.

SHAWNEE SEWERAGE AND DRAINAGE CO.  
vs.  
FRANK P. STEARNS et al.

CLERK: Please issue a subpoena for all of said defendants requiring them to appear in said court and plead on the rule day for month of October.

Dated at Guthrie, Aug. 20th, 1908.

B. B. BLAKENEY,  
*Solicitor for Complainant.*

Endorsed: No. 261. Shawnee Sew. & D. Co. vs. Frank P. Stearns. Præcipe. Filed Aug. 20, 1908. Harry L. Finley, Clerk.

110 *Chancery Subpæna.*

UNITED STATES OF AMERICA,  
*Western District of Oklahoma, ss:*

The United States of America to Frank Stearns, Mayor of the City of Shawnee; A. D. Martin, City Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jesse Pelpfrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, and W. T. Love, Members of the City Council of the City of Shawnee, and the City of Shawnee, a municipal corporation, and the Newman Plumbing Company, & Walter Newman, Greeting:

We command you and every of you, that you appear before our Judge of our Circuit Court of the United States of America, for the Western District of Oklahoma, at the City of Guthrie, in said District, on the first Monday in the month of October, next, to answer the Bill of Complaint of The Shawnee Sewerage and Drainage Company, a private corporation, this day filed in the Clerk's office of said Court in said City of Guthrie, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Western District of Oklahoma to Execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Guthrie, in said District, this 20th day of August, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

HARRY L. FINLEY, Clerk.

111      **MEMORANDUM:** The above named defendants are notified that unless they enter their appearance in the Clerk's office of said Court, at the City of Guthrie, aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

HARRY L. FINLEY, Clerk.

Endorsed.

*United States Marshal's Return.*

WESTERN DISTRICT OF OKLAHOMA, *ss.*:

Received the within writ September the 2nd, 1908, and executed the same as follows, to-wit: Served on the within named F. P. Stearns, Mayor of the City of Shawnee, Ok., and A. D. Martin, Clerk of the City of Shawnee, Ok., John Lane, M. B. Hairston, W. H. Parker, J. A. Farris, J. W. Wayne, Arthur Dimmers, M. B. Day, J. O. Prouse, G. C. Abernathy, W. T. Love, who are Councilmen of the City of Shawnee, and were served by delivering to each of above named in person, a true copy of the within summons, and by showing them the original. The following named councilmen, Jesse Pelphrey was served by delivering a copy to P. O. Cassidy, the City Attorney of the City of Shawnee, who accepted service for him, Jesse Pelphrey being absent from the city. Councilman J. B. Springer was served by leaving a copy at his place of residence in the City of Shawnee with Mrs. J. B. Springer. The City of Shawnee, a municipal corporation was served by delivering a copy of the within summons to F. P. Sterns, Mayor of the City of Shawnee. The Newman Plumbing Co. was served by delivering a true copy of the within summons to Walter Newman, who is President of the Newman Plumbing Co. The within Walter Newman was served by delivering to him in person a true copy of the original and by showing him the original in the city of Shawnee.

112      Served on the above named this 2nd day of September, 1908, in the city of Shawnee, Oklahoma.

JNO. R. ABERNATHY,

*U. S. Marshal for the Western District of Oklahoma.*

By J. P. JONES, Deputy.

Serving 17 writs.....	\$34.00
Mileage (38 at 6c).....	2.28

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\$36.28

Marshal's fee:

9/2. Serving 17 copies, at \$2.00 each, \$34.00. Served Sept. 2, 1908.

Further Endorsed.

No. 261. Circuit Court United States, Western District of Oklahoma. The Shawnee Sewerage and Drainage Company vs. Frank

stearns, Mayor of the City of Shawnee et al. Chancery Subpœna. returnable to rule day, first Monday in October, A. D. 1908. Harry Finley, Clerk. Filed Sept. 19, A. D. 1908. Harry L. Finley, Clerk. Blakeney & Maxey, Comp'ts Sol.

13 UNITED STATES OF AMERICA,  
*State of Oklahoma, Western District:*

In the United States Circuit Court of the Western District of Oklahoma.

In Equity.

THE SHAWNEE SEWERAGE & DRAINAGE CO., Plaintiff,  
vs.

FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. MARTIN, Clerk of said City; John Lain, M. B. Hairston, Jesse Pelphrey, W. A. Spiker, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, W. T. Love, as Members of the City Council of the City of Shawnee; and the City of Shawnee, a Municipal Corporation, and The Newman Plumbing Company and Walter Newman, Defendants.

*Application for Temporary Injunction.*

To the Honorable Circuit Judges of the United States in and for the Western District of the State of Oklahoma:

Your orator the Shawnee Sewerage & Drainage Company, comes now and moves the court and the honorable judges of said court for a temporary restraining order to issue in said action, to the said defendants, notifying the said defendants that at some proper time to be fixed for the convenience of your Honors, that they, the said defendants, will be required to appear in said court, and show cause why a temporary injunction should not issue herein, and that pending such hearing, the said defendants, and each of them, be restrained from constructing in the City of Shawnee on the streets and alleys occupied by the sewer system of your orator, any pipes, laterals or sewers, and restraining the said defendants from in any manner interfering with the sewer pipes, laterals and sewers 114 of your orator, now located and situated in the streets and alleys of the City of Shawnee, and in any manner or wise interfering with the rights of your orator in the enjoyment of the said streets and alleys or with the pipes, laterals and sewers of your orators, as the same are now situated in said streets and alleys, And particularly restraining the said defendant Newman, and the said Newman Plumbing Company from laying any sewers, pipes, or laterals in any of the streets or alleys in said city of Shawnee, now occupied by your orator. And upon such hearing that temporary injunction issued therein of the terms and conditions prayed for herein for a restraining order; and as prayed for in the bill and amended bill filed therein, and that in such temporary injunction

that the said defendant be enjoined until the final hearing of said cause from constructing or laying in the streets or alleys of the City of Shawnee, any laterals or sewers or pipes; and from laying in such streets or alleys such laterals, sewers or pipes, occupied by your orator; and from doing or performing any acts or things impairing the obligation of the contract of your orator with the said City of Shawnee, and from in any manner taking or appropriating the property of your orator without consideration, and appropriating the same to their own use, and depriving your orators thereof, and in support of this application and motion, your orator does hereby present and exhibit the original bill, and the amendment to such bill, and the certificate of dismissal of the action heretofore filed in the state court.

Your orator further shows that each and every and all of the allegations in the original bill and the amendments thereto, are made a part hereof with the purpose of presenting this application for temporary injunction to your honor, and the same are hereby referred to and fully adopted as if re-written herein, and 115 further shows that the defendants are tearing up and destroying the sewers of complainant.

J. H. MAXEY, JR. AND  
B. B. BLAKENEY,  
*Solicitors for Complainant.*

B. B. BLAKENEY AND  
J. H. MAXEY, JR.,  
*Att'ys for Plaintiff.*

Now on this 20th day of August, 1908, personally appeared Chas. J. Benson, Secretary of Complainant, and being by the undersigned, Clerk of the Circuit Court of the United States, duly sworn, deposes and says that he has read the above and foregoing application for temporary injunction and restraining order, and alleges the statement thereof are true.

CHAS. J. BENSON.

Subscribed and sworn to before me this 20th day of August, 1908.  
[SEAL.] HARRY L. FINLEY,  
*Clerk United States Circuit Court,  
Western District of Oklahoma.*

Endorsed: No. 261. Shawnee Sewerage & Drainage Co. vs. Frank Stearns et al. Application for Temporary Injunction. Filed Aug 20, 1908. Harry L. Finley, Clerk.

116 In the Circuit Court of the United States in and for the Western District of Oklahoma.

In Equity.

THE SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.

FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. MARTIN, Clerk of said City; John Lane, M. B. Hairston, W. A. Spiker, Jesse Perprey, J. A. Ferris, J. B. Springer, J. W. Wayne, Arthur Dimmers, N. D. Daye, J. O. Prouse, G. C. Abernathy, W. T. Love, as Members of the City Council of said City; The City of Shawnee, and The Newman Plumbing Company, and Walter Newman, Defendants.

*Order.*

Now, on this 20th day of August, 1908, complainant appeared by its solicitors B. B. Blakeney and J. H. Maxey, Jr., and presented its application for a temporary injunction, as prayed for in said complaint, and the amendment thereto, and it is ordered that the said application be set down for hearing on the 24th day of August, 1908, at 10 o'clock A. M. at the Federal Court room in the city of Guthrie, and a copy of this order be forthwith served on the defendants above named, by delivering a copy thereof duly certified to P. O. Cassidy, City Attorney for the said City of Shawnee, and to Walter Newman.

And it is further ordered that in the meantime, and until such application can be heard that the said defendants its officers, agents employees and attorneys be restrained from proceeding to lay pipes, laterals or sewers in any of the streets or alleys of the city of Shawnee, where laterals and sewers of the complainants are now located, and from tearing up or in any manner interfering with the pipes,

117 laterals or sewers of the complainant, and from interfering with any of the officers or agents of the plaintiff, in the operation of its sewers; and from — any manner interfering with the right and privileges of the complainant, in the use of their pipes, laterals and sewers in the streets and alleys of the said city; and that said restraining order shall be continued until the said application can be heard by the said court.

Witness my hand this 20th day of August, 1908.

JOHN H. COTTERAL, *Judge.*

Endorsed: No. 261. Shawnee Sewerage & Drainage Company vs. Frank Stearns, et al. Restraining Order. Filed Aug. 20, 1908.  
Harry L. Finley Clerk.

118 In the United States Circuit Court for the Western District of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.  
FRANK P. STEARNS, as Mayor, et al., Defendants.

*Notice.*

To said Defendants and P. O. Cassidy, their attorney of record:

You are hereby notified that at the time of the presentation of the application for temporary injunction in said action to the Hon. John H. Cotteral, at Guthrie, Oklahoma, on the 24th day of August, 1908, that the plaintiff will produce and introduce in evidence the files, including the petition, amendment to the petition duly verified, certificate of the clerk showing dismissal of the action described in the plea of abatement filed herein, including his certificate showing the payment of all costs to the clerk of the said court, and also the affidavit of C. J. Benson hereto annexed, and such other evidence as the court or the judge thereof will admit orally or by affidavit.

B. B. BLAKENEY AND  
J. H. MAXEY, JR.,  
*Attorneys for Plaintiff.*

I hereby accept service of above notice with affidavit of C. J. Benson attached.

Aug. 21st, 1908.

P. O. CASSIDY,  
*City Atty.*

119 In the United States Circuit Court for the Western District of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.  
FRANK P. STEARNS, as Mayor, et al., Defendants.

*Affidavit.*

STATE OF OKLAHOMA,  
*Pottawatomie County:*

C. J. Benson being first duly sworn, deposes and says that on the 19th day of August, 1908, W. M. Newman, acting for the Newman Plumbing Company, under and by virtue of a contract entered into between the Newman Plumbing Company and the city officers of the City of Shawnee, commenced laying pipes, sewers and laterals in certain and divers streets and alleys of the said city of Shawnee, and which said streets and alleys at the said time were occupied by the laterals and sewers of the complainant herein, and on the said

19th day of August, 1908, the said Newman acting as aforesaid for all of said defendants, excavated a certain alley in the said city of Shawnee just North of Main street between Bell street and Oklahoma Avenue, and did tear up certain pipes, laterals and sewers of this complainant, and did remove the same from the earth and break up and destroy them, and did continue such destruction on the 20th day of August, 1908, and until a copy of the injunction and order herein was served upon him.

That said defendants and each of them are threatening to tear up all of the laterals and pipes of the said complainant in said streets and alleys of the City of Shawnee and to lay other pipes and laterals in the said streets and alleys of the said city, and are 120 attempting to and will unless restrained, tear up and destroy all of the laterals of the said complainant and will lay pipes, laterals and sewers in the said streets and alleys of the said city of Shawnee, as stated and complained of in plaintiff's original petition.

C. J. BENSON.

Subscribed and sworn to before me this 21st day of August, 1908.

[SEAL.]

HALLIE WHITAKER,  
*Notary Public.*

My Commission expires November 27, 1911.

Endorsed: No. 261. Shawnee Sewerage & Drainage Co. vs. Frank P. Stearns, et al. Notice. Filed Aug. 22, 1908, Harry L. Finley, Clerk.

121 Office of Clerk District Court, J. G. Hudiburg, Clerk, Tecumseh, Oklahoma.

TECUMSEH, OKLAHOMA, *August 21st, 1908.*

STATE OF OKLAHOMA,

*Pottawatomie County, ss:*

No. 4360.

SHAWNEE SEWERAGE & DRAINAGE CO.

vs.

FRANK P. STEARNS, Mayor of the City of Shawnee, et al.

This is to certify that all of the costs in this court in the above entitled case has been paid in full by the plaintiff.

[SEAL.]

J. D. HUDIBURG,

*Clerk of District Court in and for  
Pottawatomie County, State of Oklahoma.*

Endorsed: No. 261. Shawnee Sewerage & Drainage Co. vs. Frank P. Stearns, et al. Certificate as to payment of costs. Filed Aug. 22, 1908. Harry L. Finley, Clerk.

122 In the Circuit Court of the United States in and for the Western District of Oklahoma.

THE SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.

FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. Martin, Clerk of said City; John Lain, M. B. Hairston, W. A. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, N. D. Day, J. O. Prowse, G. C. Abernathy, W. T. Love, as Members of the City Council of said City, The City of Shawnee, and the Newman Plumbing Company, and Walter Newman, Defendants.

*Appearance of Defendants.*

To the Clerk of the Circuit Court of the United States in and for the Western District of Oklahoma:

Now comes the above named defendants by their attorneys P. O. Cassidy and W. M. Engart, and enter a general appearance in this court in the above entitled cause, dated this the 24th day of August, 1908.

P. O. CASSIDY,  
W. M. ENGART,  
*Attorneys for the Defendants.*

Endorsed: No. 261. Shawnee Sewerage & Drainage Company, vs. F. P. Stearns and others. Appearance. Filed Aug. 24, 1908. Harry L. Finley, Clerk.

123 In the Circuit Court of the United States in and for the Western District of Oklahoma.

THE SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.

FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. Martin, Clerk of said City; John Lane, M. B. Hairston, W. A. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, N. D. Day, J. O. Prouse, G. C. Abernathy, W. T. Love, as Members of the City Council of said City, The City of Shawnee, and the Newman Plumbing Company, and Walter Newman, Defendants.

*General Demurrer to the Whole Bill.*

The demurrer of F. P. Stearns, Mayor of the City of Shawnee, A. D. Martin, Clerk of said City, John Lane, M. B. Hairston, W. A. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, N. D. Day, J. O. Prouse, G. C. Abernathy, W. T. Love, members of the City Council of the said City, The City of Shawnee, and not confessing any of the matters in the bill to be true demurs to the bill herein filed and say the same does not state

my matter of equity entitling plaintiff to the relief prayed for nor are the facts as stated in said bill of complaints sufficient to entitle plaintiff to any relief against the said defendants.

Wherefore defendant prays that judgment of this Court, whether they shall further answer and that they be dismissed with costs.

P. O. CASSIDY &  
W. M. ENGART,  
*Solicitors for the Defendants.*

I, P. O. Cassidy, Solicitor for the above named defendants do hereby certify that the foregoing demurrer, in my opinion, is well founded in law.

P. O. CASSIDY,  
*Solicitor for Defendants.*

State of Oklahoma.

124 STATE OF OKLAHOMA,  
*Pottawatomie County, ss.:*

I, F. P. Stearns, one of the above named defendants, being duly sworn on oath say that I am the Mayor of the above named defendants, the City of Shawnee, and that I make this affidavit on behalf of myself and all other defendants mentioned in the above demurrer, and I further say that the foregoing demurrer is not interposed for delay.

F. P. STEARNS.

Subscribed and sworn to before me this 22 day of August, A. D. 1908.

[SEAL.]

EDW. HOWELL,  
*Notary Public.*

My commission expires June 20, 1909.

We, B. B. Blakeney and J. H. Maxey, Junior, attorneys of record for the above named plaintiff hereby acknowledge service of a copy of the foregoing demurrer, this 22nd day of August, 1908.

B. B. BLAKENEY,  
*Attorneys for Plaintiffs.*

Endorsed: No. 261. Shawnee Sewerage & Dr. Co. vs. F. P. Stearns, et al. Demurser. Filed Aug. 24, 1908. Harry L. Finley, Clerk.

125 In the Circuit Court of the United States for the Western District of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,

vs.

FRANK P. STEARNS et al., Defendants.

*Acceptance of Service.*

We, the undersigned, P. O. Cassidy, city attorney and Walter Newman, by his attorney F. H. Reilly, hereby acknowledge service

of a copy of the attached order, on us and each of us, and accept service of the same, waiving the further service thereof.

Dated this 21st day of August, 1908.

P. O. CASSIDY,  
*City Attorney.*  
 W. M. NEWMAN,  
 By F. H. REILLY,  
*His Attorney.*

Endorsed: No. 261. Shawnee Sew. Co. vs. City of Shawnee, et al. Acceptance of Service of Order. Filed Aug. 28, 1908. Harry L. Finley, Clerk.

Further Endorsed:

NOTE.—No order attached to the above when filed—probably refers to restraining order.

HARRY L. FINLEY, *Clerk.*

126 UNITED STATES OF AMERICA,  
*State of Oklahoma, Western District:*

In the U. S. Circuit Court.

No. 261.

THE SHAWNEY SEWERAGE & DRAINAGE CO., P'tf,  
 vs.  
 CITY OF SHAWNEY, OKLA., et al.

To the Clerk of the said Court:

You will please set down for hearing the demurrer filed in this cause to the bill on the 7th day of Sept. 1908. Hearing to be had at Enid on the 7th day of Sept. 1908, it being the rule day in the month of September, 1908, or as soon thereafter as practicable.

B. B. BLAKENEY AND  
 J. H. MAXEY, Jr.,  
*Solicitors for P'tf.*

Endorsed: No. 261. In the U. S. Circuit Court. Shawnee Sewerage & Drainage Co. P'l't, vs. City of Shawnee, Okla. et al. Request to set Demurrer for hearing. Filed Sept. 7, 1908. Harry L. Finley, Clerk. B. B. Blakeney, J. H. Maxey, Jr. Sol. for Pl'ff.

127 On Monday, September 7th, 1908, the following proceedings were had:

United States Circuit Court, Western District of Oklahoma, Twenty-first Judicial Day, Monday, September 7th, 1908.

No. 261.

THE SHAWNEE SEWERAGE & DRAINAGE CO., Plaintiff,  
vs.  
FRANK STEARNS et al., Defendants.

Now on this September 7th, 1908, the court having granted a temporary injunction herein against the said defendants, as prayed for and to which order granting the said temporary injunction the defendants at the time duly excepted,

Thereupon and at this time, by consent of counsel for both parties in open court, the demurrer of the defendants, F. P. Stearns Mayor of the City of Shawnee, A. D. Martin, Clerk of said City, John Lane, M. B. Hairston, W. A. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, N. D. Day, J. O. Prouse, G. C. Abernathy, W. T. Love, members of the city council of the said city, The City of Shawnee, is argued by Counsel for the respective parties and submitted.

128 In the Circuit Court of the United States for the Western District of Oklahoma.

No. 261. In Equity.

THE SHAWNEE SEWERAGE & DRAINAGE CO., Plaintiff,  
vs.  
FRANK P. STEARNS as Mayor of the City of Shawnee; A. D. Martin, Clerk of said City; John Lain, M. B. Hairston, Jesse Pelphrey, W. A. Spiker, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, W. T. Love, as Members of the City Council of the City of Shawnee; and the City of Shawnee, a Municipal Corporation, and the Newman Plumbing Company and Walter Newman, Defendants.

*Order of Temporary Injunction.*

Now on this seventh day of September, 1908, comes the Complainant herein by its solicitor, J. H. Maxey, Jr., and come the defendants by their solicitor, W. M. Engart, and the application of the complainant for a temporary injunction against the defendants in this cause, having been argued by counsel for the respective parties and submitted; the Court being fully advised in the premises, finds that the said temporary injunction should be granted.

It is therefore, ordered by the Court, that the said defendants, their officers, agents, employees and attorneys be, and they are hereby enjoined and restrained from proceeding to lay pipes, laterals, or sewers in any of the streets or alleys of the City of Shawnee,

where laterals and sewers of the Complainant are now located, and from tearing up or in any manner interfering with the pipes, laterals or sewers of the Complainant, and from interfering 129 with any of the officers or agents of the plaintiff, in the operation of its sewers; and from in any manner interfering with the right and privilege of the Complainant in the use of their pipes, laterals, and sewers in the streets and alleys of the said city; and that this order shall be effective and in full force until the further order of the court or a judge thereof; provided, the Complainant herein shall give bond in favor of defendants, within ten days from this date, in the sum of One Thousand Dollars (\$1000.00) to be approved by the Clerk of this Court, conditioned for the payment to them of all loss or damage that may result to them or that may be awarded to them if it shall be finally determined that this order was improperly granted.

JOHN H. COTTERAL, *Judge.*

Endorsed: #261. In Equity. Shawnee Sewerage & Drainage Co. vs. Frank Stearns et al. Temporary Injunction Order. Filed Sept. 7, 1908. Harry L. Finley, Clerk.

130 UNITED STATES OF AMERICA,  
*State of Oklahoma, Western District, ss:*

In the Circuit Court of the United States for the Western District of Oklahoma.

No. 261.

THE SHAWNEE SEWERAGE & DRAINAGE Co., Plaintiff,  
vs.

FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. MARTIN, Clerk of Said City; John Lain, M. B. Harriston, Jesse Pelphrey, W. A. Spiker, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, Members Council of the City of Shawnee, and The City of Shawnee, a Municipal Corporation, and The Newman Plumbing Co. and Walter Newman, Defendants.

*Bond on Temporary Injunction.*

Know all men by these presents that we, the Shawnee Sewerage and Drainage Co., a private corporation as principals, and C. W. Kerfoot, C. J. Benson and F. B. Reed, of the district aforesaid and householders therein as sureties, parties of the first part are held and firmly bound to the said Frank P. Stearns, as Mayor of the City of Shawnee and *Frank P. Stearns Mayor of City of Shawnee*, A. D. Martin, Clerk of said city, John Lain, M. B. Harriston, Jesse Pelphrey, W. A. Spiker, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, members City Council of Shawnee, City of Shawnee, a municipal cor-

poration, Newman Plumbing Co. and Walter Newman, defendants in the above entitled action, parties of the second part, in the just and full sum of \$1000.00 for the payment of which well and truly to be made we do hereby jointly and severally bind ourselves 131 and each of our successors, heirs, executors and administrators firmly by these presents, sealed with our seals and dated this 12th day of Sept. 1908, upon conditions, as follows:

Whereas said Shawnee Sewerage and Drainage Co. has commenced a certain said action against the above named parties, defendants in the Circuit Court of the United States in and for the Western District of Oklahoma, and therein prayed for an injunction against the defendants, pending trial of this suit and whereas the Honorable Judges of the said court granted a temporary injunction as prayed by the complainant upon the condition that the said complainant shall cause to be executed good and sufficient bond to the said defendants for the sum of \$1000.00 to secure them against all loss or damage that may result to them or that may be awarded, if it shall be finally determined that this order was improperly granted:

Now, therefore, if said Shawnee Sewerage and Drainage Co. shall well and truly pay these said defendants all loss or damage that may result to them or that may be awarded to them, if it shall finally be determined the order of temporary injunction was improperly granted, not exceeding said sum of \$1000.00 then this obligation to be null and void. Otherwise to be and remain in full force and effect. Witness our hands and seals this 12th day of Sept. A. D. 1908.

THE SHAWNEE SEWERAGE COMPANY,  
C. W. KERFOOT, *President.*

[SEAL.] (Attest.) C. J. BENSON, *Secretary.*  
C. W. KERFOOT.  
C. J. BENSON.  
F. B. REED.

UNITED STATES OF AMERICA,  
*State of Oklahoma, Western District:*

C. W. Kerfoot, C. J. Benson and F. B. Reed, being duly sworn deposes and says, each for himself, and states as follows:—I am the same person whose name is subscribed to on the foregoing bond as surety therein and I state that I am worth the sum specified 132 as penalty over and above all my debts and liabilities, exclusive of property which is exempt from execution.

C. W. KERFOOT.  
C. J. BENSON.  
F. B. REED.

Subscribed and sworn to before me this 15th day of Sept. 1908.  
[SEAL.] HAL JOHNSON,  
*Notary Public.*

My commission expired Jan. 22, 1912.

Endorsed: No. 261. In the U. S. Circuit Court for the Western District of Oklahoma. The Shawnee Sewerage and Drainage Co. Private corporation, Plaintiff vs. Frank P. Stearns, as Mayor et al., Def'ts. Bond on Temporary Injunction. Filed and approved this 16th day of Sept. 1908. Harry L. Finley, Clerk.

133 In the Circuit Court of the United States for the Western District of Oklahoma.

No. 261. In Equity.

THE SHAWNEE SEWERAGE & DRAINAGE CO., Plaintiff,  
vs.

FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. MARTIS, Clerk of Said City; John Lain, M. B. Hairston, Jesse Pelphrey, W. A. Spiker, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, W. T. Love, as Members of the City Council of the City of Shawnee, and The City of Shawnee, a Municipal Corporation, and The Newman Plumbing Co. and Walter Newman, Defendants.

*Acceptance of Service.*

We, the undersigned P. O. Cassidy and W. M. Engart, solicitors for the defendants hereby accept the service of the certified copy of the Order of Temporary Injunction in the above entitled cause Witness our hand- this 14th day of September, A. D. 1908.

CASSIDY & ENGART,  
Solicitor- for Defendants.

Endorsed: # 261. Acceptance of Service Temp. Injunction Order. Filed Sept. 16, 1908. Harry L. Finley, Clerk.

134 In the Circuit Court of the United States for the Western District of Oklahoma.

No. 261. In Equity.

THE SHAWNEE SEWERAGE & DRAINAGE CO., Plaintiff,  
vs.

FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. MARTIN, Clerk of Said City; John Lain, M. B. Hairston, Jesse Pelphrey, W. A. Spiker, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, W. T. Love, as Members of the City Council of the City of Shawnee, and The City of Shawnee, a Municipal Corporation, and The Newman Plumbing Co. and Walter Newman, Defendants.

*Acceptance of Service.*

I, the undersigned, W. M. Newman, one of the defendants hereby accept the service of the certified copy of the Order of Temporary

Injunction in the above entitled cause. Witness my hand this 14th day of September, A. D. 1908.

W. NEWMAN.

Endorsed: # 261. Acceptance of Service in Sewerage case. Filed Sept. 16, 1908, Harry L. Finley, Clerk.

135 In the Circuit Court of the United States for the Western District of Oklahoma.

No. 261. In Equity.

THE SHAWNEE SEWERAGE AND DRAINAGE COMPANY, a Private Corporation, Plaintiff,

vs.

FRANK STEARNS, Mayor of the City of Shawnee; A. D. MARTIN, City Clerk of the City of Shawnee, et al., Defendants.

*Final Decree.*

Now on this 19th day of October, 1908, the same being a judicial day of an adjourned session of the June, 1908, term of said Court, the demurrer of the defendants, F. P. Stearns, Mayor of the City of Shawnee, A. D. Martin, Clerk of said City, John Lane, M. B. Hairston, W. A. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, N. D. Day, J. O. Prouse, G. C. Abernathy, W. T. Love, members of the City Council of the said City, and the City of Shawnee, filed herein to complainant's bill, having been heretofore argued and submitted to the Court by consent of both parties on, to-wit, the seventh day of September, 1908.

The said demurrer now comes on for further hearing and final determination, and the Court being fully advised in the premises, finds that the said demurrer should be sustained and the complainant's bill dismissed at the costs of the complainant.

It is thereupon, order-, adjudged and decreed by the Court that the said demurrer of the defendants, F. P. Stearns, Mayor of the City of Shawnee, A. D. Martin, Clerk of said City, John Lane, M. B. Hairston, W. A. Parker, Jesse Pelphrey, J. A. Farris, J. B.

136 Springer, J. W. Wayne, Arthur Dimmers, N. D. Day, J. O. Prouse, G. C. Abernathy, W. T. Love, members of the City Council of the said city, and the City of Shawnee, to complainant's bill, be and the same is hereby sustained, that the temporary injunction heretofore granted in this cause, be and the same is hereby dissolved and that complainant's bill be and the same is hereby dismissed at the costs of the complainant. To which judgment and decree the complainant duly excepted and excepts.

JOHN H. COTTERAL, Judge.

O. K.

B. B. BLAKENEY,  
*Solicitors for Complainant.*

## O. K.

P. O. CASSIDY, *City Attorney,*  
 W. M. ENGART, *Ass't City Att'y,*  
*Solicitors for Defendants.*

Endorsed: No. 261. Shawnee Sewerage & Drainage Co. vs. Frank Stearns et al. Final Decree. Filed Oct. 19, 1908. Harry L. Finley, Clerk.

137 In the Circuit Court of the United States in and for the Western District of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
 vs.

FRANK P. STEARNS, as Mayor, et al., Defendants.

*Notice of Appeal.*

The defendants in the above entitled action will take notice that on the 7th day of November, 1908, at the hour of 10:00 o'clock A. M. or as soon thereafter as same can be heard, that an application will be presented to the Hon. J. H. Cotteral, Judge of the said court, at his Chambers in Guthrie, Logan County said State, praying for an appeal in said action from the order of said court sustaining the demurrer of the defendant, dissolving the temporary injunction and dismissing the bill, and also praying the fixing of a supersedeas bond during the pendency of said appeal.

Dated this 6th day of November, 1908.

B. B. BLAKENEY,  
*Attorneys for Plaintiff.*

We hereby accept service of the above and foregoing notice, this 6th day of Nov. 1908.

P. O. CASSIDY, *City Attorney,*  
 WILL EVEREST, *Ass't City Att'y,*  
*Attorneys for Defendants.*

Endorsed: No. 261. Shawnee Sewerage & Dr. Co. vs. Frank P. Stearns, et al. Notice of Application of appeal. Filed Nov. 7, 1908. Harry L. Finley, Clerk.

138 In the Circuit Court of the United States for the Western District of Oklahoma.

THE SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
 vs.

FRANK P. STEARNS, as Mayor, et al., Defendants.

*Petition for Order Allowing Appeal.*

The above entitled plaintiff, the Shawnee Sewerage & Drainage Company, a private corporation, feeling itself aggrieved by the order

entered on the 19th day of October, 1908, in the above entitled proceedings does hereby appeal from said order to the Supreme Court of the United States, and prays that this, its appeal, may be allowed; and that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States, and that pending said appeal that the said order be superseded and the amount of the supersedeas bond be fixed and allowed, and that upon the giving of such security, all further proceedings of this court be suspended and stayed until the determination of said appeal by the Supreme Court of the United States.

B. B. BLAKENEY &  
J. H. MAXEY, JR.,  
*Attorneys for Plaintiff and Appellant,*  
*Shawnee Sewerage & Drainage Company.*

Endorsed: #261. Shawnee Sewerage and Drainage Co. vs. Frank P. Stearns, Mayor, et al. Petition for Order Allowing Appeal. Filed Nov. 7th, 1908. Harry L. Finley, Clerk.

139 In the Circuit Court of the United States for the Western District of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiff,  
vs.  
FRANK P. STEARNS, as Mayor, et al., Defendants.

*Assignment of Error.*

The plaintiff in error, the Shawnee Sewerage & Drainage Company makes and presents this *their* assignment of errors committed in and by the trial court herein, to-wit, the Circuit Court of the United States for the Western District of Oklahoma, from which *they* ask a reversal of this cause.

I.

The court erred in sustaining the demurrer of the defendants in error, to-wit: Frank P. Stearns, as Mayor of the City of Shawnee, A. D. Martin, as City Clerk of the City of Shawnee, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, and W. T. Love, Members of the City Council of the City of Shawnee, the City of Shawnee, the Walter Newman Plumbing Company and Walter Newman.

II.

The court erred in holding that the action of the council of the said city of Shawnee, in building and constructing its own system of sewerage and laying its mains, laterals and connections in the streets and alleys of the city of Shawnee which were being occupied by the Shawnee Sewerage & Drainage Company with its laterals,

mains and connections, under and by virtue of certain ordinances granting to the Shawnee Sewerage & Drainage Company the right to occupy such streets and alleys, and a certain judgment 140 of the district court of Pottawatomie County and a certain contract made between the said City of Shawnee and the said Shawnee Sewerage & Drainage Company and whose property was rendered wholly worthless thereby, did not impair the obligations of the contract with the said Shawnee Sewerage & Drainage Company in violation of the provisions of the Constitution of the United States.

### III.

The said court erred in holding that the bill of the said plaintiff did not state facts sufficient to entitle the plaintiff to an injunction or to any relief in equity.

### IV.

The court erred in entering the order and decree dated October 19th, 1908, sustaining the demurrer of the said defendants and dissolving the temporary injunction therefore issued, and dismissing at the cost of complainant the complainant's bill.

### V.

The court erred in holding that the action of the municipal authorities of the City of Shawnee in tearing up the mains and laterals of the plaintiff in error and laying their mains and laterals therein was not the confiscating of the property of the plaintiff without due process of law, contrary to the provisions of the Constitution of the United States.

### VI.

The court erred in not overruling the demurrer of the defendants in error.

### VII.

The court erred in not making the said temporary injunction order perpetual as prayed for in the plaintiff's amended bill.

141 In order that the foregoing assignment of errors may be made a part of the record, the Shawnee Sewerage & Drainage Company presents the same to the court and prays that such disposition may be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and complainants pray a reversal of the order and decree sustaining the demurrer of the defendants, dissolving the temporary injunction theretofore issued and dismissing the plaintiff's bill, as made and entered by said court.

B. B. BLAKENEY AND  
J. H. MAXEY, JR.,  
*Solicitors for Complainant.*

Endorsed: No. 261. Shawnee Sewerage and Drainage Company vs. Frank Stearns, Mayor et al. Assignment- of error. Filed Nov. 7th, 1908. Harry L. Finley, Clerk.

142 In the Circuit Court of the United States for the Western District of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, a Private Corporation, Plaintiff,  
vs.

FRANK P. STEARNS, as Mayor, et al., Defendants.

*Order Allowing Appeal.*

On application of the said plaintiff, the Shawnee Sewerage & Drainage Company, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and rendered herein on the 19th day of October, 1908, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein, be forthwith transmitted to the said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of \$5000.00, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal, and upon the giving of such bond the temporary injunction heretofore issued shall be continued in force until the determination of such appeal or the further order of the Supreme Court.

Dated this 7th day of November, 1908.

JOHN H. COTTERAL,  
*United States District Judge for the  
Western District of Oklahoma.*

Endorsed: No. 261. Shawnee Sewerage and Drainage Co. vs. Frank P. Stearns, Mayor, et al. Order Allowing Appeal. Filed Nov. 7th, 1908. Harry L. Finley, Clerk.

143 In the Circuit Court of the United States for the Western District of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Appellant,  
vs.

FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. Martin, as Clerk of the City of Shawnee; John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, and W. T. Love, Members of the City Council of the City of Shawnee; The City of Shawnee, The Walter Newman Plumbing Company, and Walter Newman, Respondents.

*Bond.*

Know all men by these presents that we, The Shawnee Sewerage & Drainage Company, a corporation, as principal, Chas. J. Benson, and C. W. Kerfoot and J. W. Rubey as sureties, all of the city of

Shawnee, Pottawatomie County, State of Oklahoma, are held and firmly bound unto Frank P. Stearns, as Mayor, A. D. Martin, as Clerk of the City of Shawnee, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy and W. T. Love, members of the City Council of said city, The City of Shawnee, Walter Newman Plumbing Company and Walter Newman in the full and just sum of Five Thousand Dollars (\$5000) to be paid to the said respondents aforesaid, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of November, A. D. 1908.

144 Whereas lately at a circuit court for the Western District of Oklahoma for the 19th day of October, 1908, in a suit pending in said court between the said Shawnee Sewerage & Drainage Company as plaintiff and the said Frank P. Stearns, as Mayor, A. D. Martin, as Clerk of the City of Shawnee, John Lain, M. B. Hairston, W. H. Parker, Jesse Pelphrey, J. A. Farris, J. B. Springer, J. W. Wayne, Arthur Dimmers, M. D. Daye, J. O. Prouse, G. C. Abernathy, and W. T. Love, as members of the city council of said city, The City of Shawnee, The Walter Newman Plumbing Company and Walter Newman as defendants, a decree was rendered against the said plaintiff sustaining a demurrer to the bill of plaintiff, dissolving the temporary injunction issued in said cause, and dismissing plaintiff's bill, and the said plaintiff having obtained an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit and a citation directed to the said defendants citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 7th day of December, 1908, next.

Now the condition of the above obligation is such that if the said Shawnee Sewerage & Drainage Company shall prosecute its appeal diligently to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

SHAWNEE SEWERAGE & DRAINAGE  
COMPANY,  
By C. W. KERFOOT, *Its President.* [SEAL.]  
CHARLES J. BENSON. [SEAL.]  
C. W. KERFOOT. [SEAL.]  
J. W. RUBEY. [SEAL.]

Attest:

C. J. BENSON, *Secretary.*

145 Signed and sealed this 7th day of November, 1908, in my presence.

[SEAL.]

HALLIE WHITAKER,  
*Notary Public.*

My Commission Expires Nov. 27, 1911.

Approved by me this 11th day of November, 1908.

JOHN H. COTTERAL,  
*United States District Judge for the  
Western District of Oklahoma.*

146 STATE OF OKLAHOMA,

*Pottawatomie County:*

Clarence W. Kerfoot, of lawful age being duly sworn on oath deposes and says:

That he is a resident of the City of Shawnee, in said County and State, and that he has property situated in the said State of Oklahoma, over and above all his debts, and exemptions and subject to execution to the amount of at least twenty thousand dollars (\$20,000.00) and said property is described as follows:

Eight thousand dollars of the Capital stock of the B. & W. Mercantile Company of the value of \$8000.00.

Real Estate situated in the City of Shawnee, unencumbered of the value of more than twenty thousand dollars.

C. W. KERFOOT.

Subscribed and sworn to before me this 7th day of November 1908.

[SEAL.]

HALLIE WHITAKER,  
*Notary Public.*

My Commission expires Nov. 27, 1911.

147 STATE OF OKLAHOMA,

*Pottawatomie County:*

Chas. J. Benson of lawful age being first duly sworn, on oath deposes and says; that he is a resident of the city of Shawnee said county and state and that he has property situated in said state over and above all debts and exemptions and subject to execution of the value of Ten Thousand Dollars (\$10,000) and said property is described as follows: Lots one (1) Two (2) and three (3) in Block Twenty-six (26) Amended Plat of the City of Shawnee, said County, of the value of Eight Thousand Dollars (\$8000); the East Half of Section Eleven (11) Township Eleven (11) Range two (2) East in said county of the value of Ten Thousand Dollars (\$10,000); that all of said property is free, clear and unencumbered.

CHAS. J. BENSON.

Subscribed and sworn to before me this 7th day of November, 1908.

[SEAL.]

HALLIE WHITAKER,  
*Notary Public.*

My Commission expires Nov. 27, 1911.

148 STATE OF OKLAHOMA,

*Pottawatomie County:*

J. W. Rubey being duly sworn on oath deposes and says: that he is a resident of the city of Shawnee, said County and State, and that

he has property situated in said States over and above all debts and exemptions and subject to execution, of the value of Ten Thousand Dollars (\$10,000), and said property is described as follows: One Hundred shares of the capital stock of the Oklahoma National Bank, worth Two Hundred Dollars (\$200) per share.

J. W. RUBEY.

Subscribed and sworn to before me this 7th day of November, 1908.

[SEAL.]

HALLIE WHITAKER,  
*Notary Public.*

My commission expires Nov. 27, 1911.

149 We hereby certify that we have examined the foregoing appeal bond, submitted to us by the counsel for the appellants in the case of the Shawnee Sewerage and Drainage Company vs. Frank P. Stearns, as mayor of the city of Shawnee, et al., and that said bond is satisfactory to us, and the sureties named therein responsible for the amount of the bond.

Witness our hands this 9th day of November, 1908.

P. O. CASSIDY,  
WM. M. ENGART,  
*Of Counsel for Defendants.*

Endorsed: No. 261. In the Circuit Court of the Western District of Oklahoma. Shawnee Sewerage & Dr. Co. vs. Frank P. Stearns, as Mayor, et al. Supersedeas Bond. Filed Nov. 11th, 1908. Harry L. Finley, Clerk.

150 In the Circuit Court of the United States for the Western District of Oklahoma.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Plaintiffs,  
vs.  
FRANK P. STEARNS, as Mayor, et al., Defendants.

*Præcipe for Transcript of Record.*

The Clerk of the said court will please make a transcript for appeal in said cause of all papers, pleadings filed, orders, exhibits, evidence, affidavits, demurrers, motions, the judgment and final order, the application for appeal and allowance thereof, supersedeas bond and assignments of error, and each and every pleading and appearance made, had and filed in the said cause, and certify to the same and send the same to the clerk of the Supreme Court of the United States, as by law provided.

B. B. BLAKENEY,  
*Attorney for Plaintiff.*

Endorsed: No. 261—Shawnee Sewerage & Drainage Co. vs. F. P. Stearns et al. Præcipe for Transcript. Filed Nov. 27, 1908. Harry L. Finley, Clerk.

151 UNITED STATES OF AMERICA,  
*Western District of Oklahoma, ss:*

I, Harry L. Finley, Clerk of the Circuit Court of the United States for the Western District of Oklahoma, do hereby certify that the foregoing transcript contains true, full and complete copies of all the pleadings, proceedings, writs, records and record entries in the case of The Shawnee Sewerage and Drainage Company, Plaintiff, vs. Frank P. Stearns, Mayor of the City of Shawnee et al., Defendants, No. 261, In Equity, as required by the "Praecept for Transcript" filed by the Complainant on November 27th, 1908, as full, true and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation in said cause is hereto attached and returned herewith.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in Lawton in said District this 1st day of December, A. D. 1908.

[The Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,  
*Clerk of the Circuit Court of the United States  
for the Western District of Oklahoma.*

Endorsed on cover: File No. 21,433. W. Oklahoma C. C. U. S. term No. 109. The Shawnee Sewerage & Drainage Company, appellant, vs. Frank P. Stearns, as mayor of the city of Shawnee; A. D. Martin, as Clerk of the city of Shawnee; John Lain et al., members of the city council of the city of Shawnee, et al. Filed December 1, 1908. File No. 21,433.

SHAWNEE  
TERRITORY

1855-1861

1861-1865

# SHAWNEE CODE OF THE UNITED STATES

OCTOBER 1, 1855-1861

## THE SHAWNEE SUGAR PLATE AND DRAUGHT COMPANY

B. B. BLACKBURN

W. C. MAXWELL

W. H. COOPER

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1910.

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THE SHAWNEE SEWERAGE AND  
DRAINAGE COMPANY,

*Appellant.*

vs.

FRANK P. STEARNS, AS MAYOR OF  
THE CITY OF SHAWNEE, ET AL.,

*Appellees.*

} No. 109.

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STATEMENT OF FACTS.

This is an appeal from the Circuit Court of the United States for the Western District of Oklahoma, from a decree entered on October 19, 1908, dissolving a temporary injunction theretofore granted in this cause, and sustaining the appellees' demurrer to the appellant's bill and amendment thereto.

The suit was originally commenced on the 20th day of July, 1908 in the aforesaid circuit court, by

filling a bill in equity, which appears on pages 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the record. There was attached to the bill a number of exhibits, which appear on pages 11 to 29 inclusive, of the record. The appellant, the complainant below, alleged that it was a private corporation organized under the laws of the Territory of Oklahoma, and engaged in the business of constructing and operating a system of sewerage in the City of Shawnee, in the Western District of Oklahoma; that the defendants were the duly elected, qualified and acting mayor and council of the City of Shawnee, a municipal corporation. That on the 22d day of November, 1901, the defendant being a city of the first class, and being a corporation under and by virtue of the laws of the Territory of Oklahoma, and having authority in the premises, did by ordinance, grant to DeBruler, Newman & Company, their successors and assigns, the privilege to build and maintain, in the City of Shawnee, a system of sewerage, for a term of fifty years. A copy of the ordinance was attached to the bill and marked Exhibit "A" for identification, and will be found on pages 11, 12 and 13 of the record. And that thereafter, on the 28th day of February, 1902, the said council, by ordinance, amended the original ordinance, providing that the term of its existence should be for a period of twenty-one years, which amendment was evidenced by an ordinance duly passed, numbered 228, a copy of which was

marked Exhibit B and attached to the complainant's bill, and is found on pages 13 and 14 of the record.

This ordinance, amending the original one, was passed to conform to the requirements of the statutes of the Territory of Oklahoma, in regard to the time for which a franchise of this character could be granted, the law providing at that time, a maximum of twenty-one years as the period for which a franchise could run; and that thereafter, De Bruler, Newman & Company, for a valuable consideration, assigned and set over to the complainant, all of their rights, privileges and immunities properties and interest in and to the said sewer system granted to them under the provisions of the said ordinance, and that the city of Shawnee, by ordinance duly passed, which was numbered 242, ratified and confirmed the assignment and transfer of the rights and privileges granted to the said DeBruler, Newman & Company, to the complainant in this case, which assignment being duly ratified as aforesaid, did vest the appellant with the interest, title, rights, privileges and immunities of the said franchise, for the building, constructing, erecting and maintaining said sewer system in the City of Shawnee. A copy of said ordinance was attached to the complainant's bill, marked Exhibit C and made a part thereof, and will be found on pages 14 and 15 of the record.

The complainant further charged that by the terms of said ordinances, that the appellant agreed

to allow the use of its sewers for the city hall, jail, fire department and public watering trough, within the limits of the said city, free of charge to the said city, and that the city obligated and bound itself to furnish water to flush the said sewer, free of charge.

Complainant further charged that under and pursuant to said ordinances, and relying thereon, after giving the bond required thereby, and conditioned as by the said ordinances required, did commence and complete the construction of a system of sewerage in the City of Shawnee, and lay and extend mains and lateral sewers over and throughout the limits of the said city, and spent and invested in such extension the sum of Forty Thousand (\$40,000.00) Dollars, and that under and pursuant to Ordinance No. 242 heretofore referred to, and which is found on pages 14 and 15 of the record, issued its bonds, secured by mortgage upon its property, in the sum of Twenty-Five Thousand (\$25,000.00) Dollars, payable twenty-one years from the date of the same, and bearing interest at the rate of six per cent, and sold the same to various and divers innocent purchasers and holders thereof, who were, at the time of the institution of this suit, owners of the said bonds. That it had allowed the city the use of the said sewer system, free of charge, for the city hall, jail, fire department, and watering trough, and connected the said sewer therewith, and that it performed its duties to the

r. v.  
city of

that regard and did in every way, comply with the conditions, duties and obligations imposed by the said ordinances, and was at that time, and had for a long time, prior thereto, maintained in the said City of Shawnee, a sewer system that was adequate to and met all the demands and necessities of the said City of Shawnee, for sewerage purposes (Rec. p. 4).

That the complainant was the owner of the said property which was regularly assessed, and that it paid the city, county and state taxes, and that the taxes imposed by the said city upon the property owners of the City of Shawnee, were extended to and charged against and collected from the complainant's property as their interests appear from time to time, and in the manner provided by law. That on or about the 1st day of December, 1901, that the city, in order to encourage the complainant to build the said sewer system in compliance with their ordinances, passed an ordinance providing that when the said sewer system should be extended, that all overground closets should be declared a public nuisance, and requiring all property owners adjacent to such system, to connect with the said sewer system, but that immediately after the complainant had invested a large sum of money in the construction of the said sewer, that the city repealed the said ordinance, and has habitually and systematically discouraged, and by divers means, attempted to impair the investment of your orator's property, and to take the same without paying any

compensation therefor, knowing that the complainant had relied upon the privileges and immunities granted by the said ordinances, in the making of the said investment. (See Rec. p. 5).

The bill charged that on or about the 5th day of October, 1906, the mayor of the City of Shawnee, issued a proclamation calling an election, and submitting to the voters the question of issuing bonds in the sum of Sixty-five Thousand (\$65,000.00) Dollars, for the purpose of extending a water works system in the said city, and also for the building of a public sewer, and that at the said election, that the bond issue was carried, and the same was canvassed, and thereafter the mayor of the city duly issued a proclamation declaring that the said bonds had carried, but that on the 6th day of November, 1906, the complainant herein, instituted a suit in the District Court of the Third Judicial District of the Territory of Oklahoma, alleging and setting forth the ordinances heretofore referred to in this statement, charging that the complainant had expended large sums of money in the building and erection of the said sewer system; that they had constructed and were maintaining a main sewer, together with certain lateral sewers, in the City of Shawnee; that the said laterals were connected with the main sewer and were all a part of the said sewer system. (Rec. p. 56-7-8). That the complainant had constructed its sewers along the streets and alleys of the said city, following as near as prac-

ticable, the natural drainage of the said city, and did build laterals and connect with the closets of the private properties of the said city. That the defendant, in violation of the franchise and the contract entered into between it and the complainant, was commencing to, and unless enjoined, would erect its main sewer alongside of the main sewer of the complainant, and cause the citizens of the said city to connect with the public sewer, for the reason that as the city must build and maintain such system and no other, or further consideration would be required, and that the citizens whose property was connected with the complainant's system would be taxed to maintain the defendant's sewer, whether connected with it or not, would therefore be induced to connect with the said system of the defendant, and the property of the complainant being wholly underground, would be worthless and valueless, and would be totally destroyed and appropriated without due process of law, and without paying any compensation therefor. A copy of the petition, which complainant alleges was filed in the District Court of the Territory of Oklahoma, will be found on pages 21-2-3-4-5-6-7-8 and 29 of the record, and it will be found that this petition was filed on the 6th day of November, 1906.

We want to invite the court's attention to the fact that the petition in that case, which is found on pages 21 to 29 inclusive of the record, contains the same allegations and states the same propositions al-

most identically, word for word, as stated in the bill in equity filed by the complainant in this case. It will be observed that the parties are identically the same, except that the officers of the defendant city, in some respects, have been changed, but the suit was brought by this complainant against the mayor and councilmen of the City of Shawnee.

The complainant further alleges that thereafter, on the 22d day of December, 1906, the action filed in the Territorial court to enjoin the city from building its main sewer alongside of the main sewer of the complainant, was duly tried and a decree was duly rendered and given adjudging and decreeing that the complainant in this case had a legal and valid franchise from the defendant, and was authorized by the said franchise to carry on its business of operating said sewer system in the City of Shawnee, and that by the terms of the said franchise the defendant was excluded from constructing any sewer system, and the operation and construction of this sewer by the said city, in the immediate vicinity of the complainant's sewer, would confiscate the plaintiff's property, and would depreciate the value of the bonds thereon, and that the complainant had the exclusive right against said city, and further alleges that by the terms of the decree, the defendants were enjoined from building and operating a sewer system in the vicinity of the complainant's sewer, until after it should be condemned or purchased by the city, ac-

cording to law; and was perpetually enjoined from building, or preventing the complainant from connecting with the main sewer of the defendant, free of charge, and to use the same by such connection with the district sewer and laterals belonging to the complainant. A copy of the decree rendered in the Territorial Court was attached to the complainant's bill, marked Exhibit B, and is found on pages 15, 16, 17, 48 and 19 of the record.

The petition filed in the said case was referred to as Exhibit G, and was from pages 21 to 29 inclusive, as heretofore referred to, and the complainant charged that the exhibits attached to the original petition filed in the Territorial Court, were the same identically, as the exhibits A, B, and C respectively, attached to the complainant's bill in this case. (Rec. pp. 5 and 6).

It will be noticed from this decree, which appears on pages 15 to 19 inclusive, that the defendant in this case was enjoined perpetually from conducting a main sewer alongside of the main sewer of the complainant, and that the court found that the complainant was the owner and holder of the franchise and the sewer system erected thereunder. That it had sold its bonds to innocent purchasers, to raise money for the purpose of constructing said sewer; that the construction and operation of the system, by the City of Shawnee, in the immediate vicinity of the complainant's sewer, would confiscate the plaintiff's

property, and depreciate the value of the bonds thereon, and further enjoining the defendant from preventing the complainant from connecting with the main sewer of the defendant, free of charge; that is, connecting the lateral and district sewers belonging to the complainant, providing the defendant purchased the complainant's main sewer.

The complainant further charges that on the 3d day of March, 1907, that it entered into a contract with the defendant, which provided that in consideration of the Sum of Six Thousand Nine Hundred (\$6,900.00) Dollars, and of the stipulations set forth therein, that the complainant sold and transferred to the defendant, all of its main line of sewer, describing it, and that the city would recognize the rights of the complainant in the laterals which were then laid in the said city, and which were of the value of Thirty Thousand (\$30,000.00) Dollars; that the said contract provided that the city should be divided into sewer districts, for the purpose of laying and constructing laterals in the said districts, and that said city would cause the property of the complainant to be appraised, and the price of the same set forth, and would use all lawful means to tax up the laterals and the price agreed upon to the abutting property, and would deliver the tax warrants unto the complainant, which would be in payment of the said laterals. A copy of the contract was attached to the complain-

ant's bill, marked Exhibit E, and is found on pages 19 and 20 of the record.

This contract was made on the 3d day of March, 1907, after the decree had been rendered on the 22d day of December, 1906.

The bill further alleges that the complainant did, on the 1st day of June, 1908, in order to comply with the terms of their contract above referred to, submit to the defendant, a proposition offering to relay and lower all of the laterals owned by it, to be the depth required by the plans and specifications as prepared by the city engineer and under his direction, and at the engineer's estimate of cost, in a good, workman-like manner, which offer was in writing, a copy of which was marked Exhibit F and attached to the complainant's bill, and made a part thereof, which is found on page 20 of the record.

That the complainant was ready and willing, and offered to lower the said laterals, if they needed to be lowered, to repair and put into condition the conduits of the several sewer districts, and offered to, at their own expense, make the said laterals conform, in every respect, by lowering or raising them to the plans and specifications, but that the defendant refused to permit them to do so. (Rec. p. 7-8-9).

Complainant alleges that it was ready and willing to carry out the terms of its contract referred to as Exhibit E, and that the citizens of the several districts were anxious for the defendant to carry out the terms of the said contract, and to have the laterals of the

complainant appraised as provided therein, and to have the amount of such appraisal taxed to their property, and that several citizens of the several sewer districts have petitioned the defendant to do so, for the reason that the complainant offered to sell its laterals at a price considerably less expensive to the citizens and property owners, than the erection of a new or public sewer under said bond issue, but that in disregard of the said contract, the defendants refused to appraise the laterals of the complainant, or to agree with them on the price thereof, and neglected to use any lawful means to tax up the said laterals to the abutting property and deliver the tax warrants to the complainant, and refused and neglected, to in any way, buy, purchase or condemn the laterals belonging to the complainant, and refused to permit the citizens of the several sewer districts to purchase such laterals, but for the purpose of confiscating the complainant's property, and rendering it worthless and valueless, and in disregard of its contract, and the decree of the Territorial Court heretofore referred to, it had let a contract to the Newman Plumbing Company, to build laterals in the same streets and alleys alongside the laterals of the complainant, although the contract price to the said Newman Plumbing Company was far in excess and more expensive to the property owners, than the laterals of the complainant, and although such laterals were adequate to accommodate connections with the defendant's main

sewer, and that if the same was inadequate, that the complainant had offered and now offers to make them adequate. (See Rec. p. 18, par. 18).

That on or about the 1st day of June, 1908, the defendant caused its city engineer to make plans and specifications for the building of laterals in the said City of Shawnee, and in the several districts thereof, and divide the city into four districts, and required the said laterals to be constructed and laid in the said streets and alleys in conformity with the plans and specifications and in exact conformity with the laterals and sewer pipes owned by the complainant in the streets and alleys, and to be made of the same material, and placed in substantially the same places and the same depth, and that the said city engineer had filed with the defendant, his report, showing his plans and specifications, and that the complainant at once proposed to lower or raise, as conditions might require, its said laterals and sewer pipes, so that they would in all respects, conform with the plans and specifications of the said engineer, but that the defendants, and each of them, had refused to entertain the said proposition, and were about to make a contract with the Newman Plumbing Company, to lay the said laterals as aforesaid. (Rec. p. 89.) That the said city had ordered the said laterals to be laid alongside the pipes and laterals of the complainant, and had attempted to assess the cost of the same upon the abutting property owners, and had attempted to con-

fiscate and appropriate the system of the complainant by constructing a sewer system in the same vicinity and in the same portions of the city, and seizing the property of the complainant and charging taxes against it, for the support of the said public sewer, without authority of law, and that the same was a taking of the complainant's property, without due process of law. Complainant prayed for an injunction, enjoining the defendant from constructing within the City of Shawnee, laterals or sewer connections in the streets and alleys where the complainant's laterals were situated, and were situated on the 3d day of March, 1908, and from doing or performing anything that tended to appropriate the property of the complainant, without due process of law, or that impaired the provisions of the contract of the parties, and on the same date, the appellees entered an appearance in the Circuit Court, which appears on page 30 of the record and filed a plea to the jurisdiction of the court, which plea appears on pages 31 and 32 of the record. And to the same were attached several exhibits, which appear on pages 32-3-4-5-6-7-8-9-40-1-2-3-4-5-6-7-8-9-50-1. They also, at the same time, filed a demurrer to the bill, which appears on pages 52 and 53, and thereupon, the court, after considering the plea to the jurisdiction, entered an order which appears on page 53 of the record, finding that from the plea, as presented by the defendants, that there was a private suit pending in the state court of Pot-

tawatomie County, and ordering the application for a temporary injunction on the complainant's bill, stayed, pending the suit in the state court. Thereupon the complainant introduced dismissal of the case in the state court, which appears on page 54 of the record.

Thereafter, on application, the circuit court permitted the complainant to file an amendment to this bill, the order permitting the same being found on page 56 of the record, and the amendment will be found on pages 57 and 58. The amendment contains the allegation that there was at the commencement of the action, more than \$2000.00 exclusive of interest and costs, involved in this action, and further amended the prayer asking for a temporary injunction pending the hearing, and a permanent injunction enjoining the defendants from constructing laterals or sewers and laying pipes in the streets and alleys of the city of Shawnee where the complainant's laterals and pipes were located, and from doing or performing anything that tended to appropriate the property of the complainant without due process of law, or which impaired the obligations of the contract between the parties, and also prayed for a writ of subpoena to be issued to the defendant. Subpoenas were thereupon issued and duly served on the defendants and each of them, and thereafter, on the 20th day of August, 1908, the complainant made an application for a temporary injunction, which was a separate and distinct appli-

cation from that contained in the amendment to the bill, and on the same date, a restraining order was issued, restraining the defendant from laying pipes or laterals and sewers in the streets and alleys of the City of Shawnee, where the laterals and sewers of the complainant were located, and from taking up or in any manner interfering with the pipes, laterals or sewers of the complainant. Said order will be found on page 63 of the record.

Thereafter, on the 24th day of August, 1908, the defendants filed a general demurrer to the whole bill, which appears on pages 66 and 67 of the record, and on the 7th day of September, the court made and granted a temporary injunction in the said cause, which appears on pages 69 and 70 of the record, which order of temporary injunction was made on the condition that the complainant entered into a bond in the sum of \$1000.00 to be approved by the clerk, which was done and performed by the complainant, and which bond appears on pages 70 and 71 of the record.

That thereafter, on the 19th day of October, 1908, the court sustained the demurrer submitted by the defendants, to the bill, dissolving the temporary injunction before granted, and dismissed the complainant's bill, at the complainant's cost, to which judgment and decree the complainant duly excepted. (See Rec. p. 73).

The complainant, in due time, filed a notice of ap-

peal, and its petition for an order allowing an appeal and assignment of error, which appear on pages 74, 75 and 76 of the record, and the court, in due time, entered an order allowing the appeal, which appears on page 77. An appeal bond was duly fixed and given as by law required, and the question was submitted upon the demurrer, which appears on pages 66 and 67, entitled "General Demurrer to the Whole Bill," and which was directed against the complainant's original bill and amendment thereto.

This is a case that involves the construction or application of the constitution of the United States, and the appeal is prosecuted to this court.

### SPECIFICATION OF ERRORS.

The appellant assigns seven specific errors, which appear on pages 75 and 76 of the record, which are as follows:

First. The court erred in sustaining the demurrer of the appellees, to-wit: Frank P. Stearns as mayor, etc., and others.

Second. The court erred in holding that the action of the council of the said City of Shawnee, in building and constructing its own system of sewerage, and laying its mains, laterals and connections in the streets and alleys of Shawnee, which were being occupied by the Shawnee Sewerage & Drainage Company, with its laterals, mains and connections, under and by virtue of certain ordinances granting to the Shawnee Sewerage & Drainage Company the right to occupy such streets and alleys, and a certain judgment of the district court of Pottawatomie County, and a certain contract made between the said city of Shawnee and the said Shawnee Sewerage & Drainage Company, and whose property was rendered wholly worthless thereby, did not impair the obligations of the contract with the said Shawnee Sewerage &

Drainage Company, in violation of the provisions of the constitution of the United States.

Third. The said court erred in holding that the bill of the plaintiff did not state facts sufficient to entitle the plaintiff to an injunction, or to any relief in equity.

Fourth. The court erred in entering the order and decree dated October 19, 1908, sustaining the demurrer of the said defendants, and dissolving the temporary injunction theretofore issued, and dismissing at the cost of the complainant, the complainant's bill.

Fifth. The court erred in holding that the action of the municipal authorities of the City of Shawnee, in tearing up the mains and laterals of the plaintiff in error, and laying their mains and laterals therein, was not a confiscation of the property of the plaintiff, without due process of law, contrary to the provisions of the constitution of the United States.

Sixth. The court erred in not overruling the demurrer of the appellees.

Seventh. The court erred in not making said temporary injunction order perpetual, as prayed for in the plaintiff's amended bill.

These several assignments we desire to present to the court, under two subdivisions, which we will argue.

First. That the injunction entered in the Territorial court was *res judicata*, as to the rights of the parties herein, in this controversy, and that the action

of the appellees in disregarding such injunction and erecting a sewer alongside of the sewer of the appellant, and tearing up the appellant's property, was a taking of the appellant's property, without due process of law, and impairing the obligation of appellant's contracts with the city.

Second. That the contract entered into between the appellant and the appellees, on the 3rd day of March, 1907, was a valid, binding and subsisting contract between the appellant and the appellees, and the ordinance granting the franchise to complainants' assignors constituted a binding contract between them, and that the letting of a new contract to the Newman Plumbing Company, and passing an ordinance providing for the erection of a public sewer, to be owned and operated by the appellees, impaired the obligation of the appellant's said contracts and each of them.

**ARGUMENT.**

The appellees granted the franchise No. 228, which appears on pages 11, 12 and 13 of the record, and also the amendment thereto, which appears on pages 13 and 14 of the record, to the assignors of the appellant, under and by virtue of the laws of the state.

The statutes which were in force at the time of the granting of this franchise, will be found in Volume 1 of Wilson's Revised & Annotated Statutes of Oklahoma, 1903. Section 24, Article 3, Chapter 12, at page 234 of that publication, provides, among other things, as follows:

"The mayor and council shall have the care, management and control of the city and its finances, and shall have the power to enact, ordain, modify or repeal any and all ordinances not repugnant to the laws of the United States, and the organic act and the laws of this Territory, as they shall deem expedient and for the good government of the city, the preservation of the peace and good order, the suppression of vice or immorality, and the benefit of trade and commerce, and the health of the inhabitants thereof, and such ordinances, rules and regulations as may be necessary to carry such power into effect."

And section 25 of the second subdivision thereof, provides:

"The cities coming under the provisions of this act in their corporate capacities, are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by law. Second, to open, straighten and improve streets, avenues and alleys; make sidewalks and build bridges, culverts and sewers within the city; and for the purpose of paying for the same, shall have power to make assessments in the following manner, etc."

And section 54 of the same article, which appears on page 241, provides as follows:

"The council may purchase or condemn and hold for the city, within, or outside of the city limits, within five miles therefrom, all necessary lands for hospital purposes and waterworks, and erect, establish and regulate the hospitals, work houses and poor houses, and provide for the government and support of the same, and make regulations to secure the general health of the city, and to prevent and remove nuisances, and to make provisions for furnishing the city with water, etc."

And section 62 of the same act provides:

"For any purpose or purposes, mentioned in the preceding sections, the council shall have power to enact and make all necessary ordinances, rules and regulations, and they shall also, have power to enact and make all such ordinances, by-laws, rules and regulations, not inconsistent with the laws of the Territory, as may be expedient for maintaining the peace, good government, and welfare of the city, and its trade and commerce," etc.

And section 71 of the same act, which will be found on page 245 of said statute, provides as follows:

"That in cities of the first class, the city council may, by ordinance, provide for the extension or construction of laterals to main or lateral sewers constructed at the cost of the city, and shall be authorized to levy a special assessment on all lots abutting upon such sewer, and shall apportion such levy to the various lots, according to the actual cost of labor or material expended in constructing such lateral along the lot assessed, etc."

The above were the provisions of the statute, giving to the appellees the authority to grant the franchise heretofore referred to. The power to grant a franchise to build, maintain and operate a sanitary sewer, is implied from the general powers to control the streets or to protect the public health.

*Charleston vs. Johnston*, 170 Ill., 336; 48 N. E., 985.

*Kirtland vs. Indianapolis*, 142 Ind., 123; 41 N. E., 374.

*Weis vs. Madison*, 75 Ind., 241

*Kelsey vs. King*, 32 Barb., 410

*Come vs. City of Hartford*, 28 Conn., 363.

*City of Fort Wayne vs. Coombs*, 107 Ind., 75; 7 N. E., 743.

*Andrews vs. National Foundry Works*, 61 Fed., 782.

In the last case above cited, which was decided by the Circuit Court of Appeals for the Seventh Circuit, it is held that where a city, in addition to a grant

of general powers, was given the right to erect a waterworks system, that it possessed the power to grant a corporation a franchise to erect the same and supply the inhabitants with water. Discussing this matter the court say:

"The City of Oconto, by its own charter, had the power, and therefore, was under the duty, of caring for the public health. That power it could employ in any reasonable way; if it chose, for instance, by contracting for a water supply through pipes laid in the streets. The making of such a contract would, of necessity, carry with it the right, on the part of the contractor, to lay the pipes and to operate the plant. Such right is a franchise, and, the making of the contract operating by necessary implication as a grant of the privilege of franchise, the power given to make the contract was power to grant the franchise. But besides the power to provide for the health of its inhabitants, the city of Oconto had the express power apparently not brought to the attention of the court below, 'to provide for the erection of waterworks for the supply of water to the inhabitants of the city.' We do not agree with the suggestion of counsel that by this provision the city had no right to contract for a supply of water, and was authorized only to construct and operate a plant of its own. The authority extended to any reasonable method; and it follows, that, before the Oconto Water Company was incorporated, the City of Oconto, by its own charter, had power, from the state, to grant franchises like those in question to any person or body capable of receiving them."

There seems to be no question but what municipalities generally, have authority and general powers to provide for and protect the public health and gen-

eral welfare of the city, to enter into contracts with persons, firms or corporations, to build, erect and operate sanitary sewers, and also, as held by the Circuit Court, *supra*, it is generally held that the authority to build and maintain sewers, is construed to mean that municipalities may operate their own sewers or may contract with other persons to own and operate the same. It certainly would be a very narrow construction of these statutes above referred to, to contend that the city would have no power to provide by ordinance for the erection of such improvement.

No question was raised in the court below as to the authority of the appellees to grant the franchise, and we pass that without any considerable discussion.

After the passage of the ordinance granting to complainants' assignors, the franchise to build and erect said sewer system, and before the voting of the bonds and letting of the contract, for the public sewer, the legislature of the Territory of Oklahoma, passed a very full and complete act authorizing municipal corporations to extend or build general sewer systems, and to levy a special assessment of taxes to pay for the same. This act will be found in the Session Laws of 1903 of Oklahoma, Chapter 6, Article 1.

#### JURISDICTION.

The respondent presented a plea to the jurisdiction of the court, which appears on pages 30, 31 and

32 of the record, which plea was by the court duly overruled, but which question will probably be presented in this court.

That the grant of a right to supply gas or water, or to maintain a sewer in a city, through pipes and mains laid in the streets, upon the condition of the performance of the service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and after the performance by the grantee, is a contract protected by the constitution of the United States, against acts of the state legislature to impair it, seems to be well settled by a long line of authorities in this court.

*City of Walla Walla vs. Walla Walla Water Co.*, 172 U. S., 1.

*Vicksburg Water Co. vs. City of Vicksburg.*  
185 U. S., 65.

*New Orleans Gas Co. vs. Louisiana Light Co.*,  
115 U. S., 650.

The question of the jurisdiction of the Federal Court in cases of this kind, is very fully and thoroughly discussed in the cases above cited. In the case of *Walla Walla vs. Walla Walla Water Co.*, *supra*, this rule is stated in paragraph 1 of the syllabus, as follows:

"The impairment of a municipal contract for a water supply by establishing its own system of water works is not excluded from the constitutional provision against impairing the obligation of contracts, on the ground that the city makes the contract and takes

the action which impairs it in its proprietary capacity, and not as an agency of the state."

And paragraph 2 of the syllabus also states the rule as follows:

"The grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Federal Constitution against state legislation to impair it."

In this case the court will observe that the bill alleges that the appellees granted to the appellants, or their assignors, a franchise to build, maintain and operate a system of sewerage in the City of Shawnee, for a period of twenty-one years; that the appellants accepted the terms of the said franchise, and proceeded to and did build, erect and maintain said system, and that thereafter, after they had expended large sums of money, and had built and erected a sewer system, adequate to the needs and necessities of the city, that the appellees voted bonds and passed an ordinance, letting a contract to build a public sewer in the streets and alleys alongside of the property of the appellants; that said sewer was to be supported by taxation; that the property would be taxed to support the said public sewer, whether the same was patronized or not by the inhabitants; that thereupon the

appellants instituted a suit against the city, in the District Court of the Territory of Oklahoma, seeking to enjoin them from building and erecting said public sewer alongside of the sewer owned and operated by them; that in that case, the court found that the city was excluded by their franchise from building and erecting such public sewer, without first having condemned the private sewer and paid just compensation therefor, and entered a decree permanently enjoining the city from so doing. That thereafter, the appellants sold a part of their main sewer, to the city, and entered into a contract with them, in which they agreed as a part compensation for the main sewer aforesaid, that they would tax up against the property owners a tax sufficient to pay the appellants for the laterals and district sewers.

The appellants contend that this original franchise constituted a contract between it and the city; that this contract had been construed and adjudicated by the District Court of the Territory of Oklahoma, as being exclusive and prohibiting the city from building and maintaining a public sewer, and that the subsequent contract in regard to laterals, was a valid and subsisting contract, and that the letting of the contract to build a public sewer, as set out in the bill, would impair the obligations of the appellant's contract, and would appropriate and deprive them of their property, without due process of law. That this presented a federal question seems to be settled beyond question by the authorities above cited.

## I.

The court will observe that the complainant charges in its bill, paragraph 10, on pages 5 and 6 of the record, that on the 6th day of November, that it commenced an action in the District Court of Pottawatomie County, to enjoin the appellees from building, constructing and maintaining said sewer system, without having first purchased the property of the complainant or compensating it therefor, and that a copy of the petition was attached to the complainant's bill, marked "Exhibit G," and made a part thereof, and that the exhibits attached to the original petition, in the district court, were the same as Exhibits A, B and C, attached to the complainant's bill in the case at bar. That the complainant further alleges and averred that on the 22d day of December, 1906, the action was duly tried in the said court, and a decree was rendered and given, adjudging and decreeing that the respondents were excluded from constructing a competing sewer, and that the operation and construction of such sewer by the respondents, in the immediate vicinity of complainant's sewer, would confiscate their property, and that they had the exclusive right as against said city, and that the said city was enjoined from building and operating a sewer system in the vicinity of the complainant's system, until after its sewer should be condemned or purchased. A copy of said decree entered in the District Court of the said Territory, was attached to the complainant's

bill, marked "Exhibit D" and is found on pages 15, 16, 17, 18 and 19 of the record.

It will be observed by a casual reading of these pleadings and the decree entered in the Territorial court, that the complainant had built a system of sewerage in the City of Shawnee, which consisted of a main sewer and certain lateral or district sewers connected thereto, which all formed one complete system, which was erected by complainants herein under and pursuant to its franchise, and the petition filed in the District Court of the Territory is in almost the same language, verbatim, as the language used in complainants' bill in this case.

In the case tried in the Territorial court, the decree was entered and the cause was presented on the main sewer, not on the laterals, and the court there found, as shown by the decree, that the complainant's franchise was exclusive as against the city, insofar as the main sewer was concerned. It found the value of the sewer to be \$6900, and enjoined the defendants permanently and perpetually from building a main sewer until they had condemned or purchased, or in some way compensated the complainants for their main sewer.

We say that the slightest reading of the pleadings in the two cases will show that they present identically the same questions and propositions. In fact, they are in the same identical language, with the exception that in the bill filed in the Circuit Court of the

United States, reference is made to the decree in the District Court of the Territory, and also to the contract made at the time that the decree was entered.

This sewer system being one general system, and as alleged in the bill, being erected and operated under one contract or franchise, the lateral or district sewers being a part of the same system of which the main sewer was a part, it is the contention of the appellants in this case, that the adjudication of the District Court of the Territory of Oklahoma, and the decree entered therein, which appears on pages 15, 16, 17, 18 and 19 of the record, was *res judicata* as to the rights of the parties in the present case. The District Court of the Territory, being a court of general jurisdiction, both in law and equity, and having jurisdiction of the parties and the subject matter, adjudged and determined the rights of the parties herein, which judgment was never appealed from, but became final, and was at the time of the filing of this suit, final and in complete force and effect.

We take it to be a general principal and rule well settled, that a question of fact directly put in issue and determined by a court of competent jurisdiction, cannot be disputed in a subsequent suit between the parties or their privies, even if the second suit is for a different cause of action, if it involves the same question. For instance, it has been universally held that a judgment on an interest coupon for a bond, is conclusive as to the rights of the parties, on the bond it-

self, and this seems to be true, whether the original case was rightfully determined or not, if the court had jurisdiction of the parties and subject matter.

*Southern Pacific Ry. Co., et al. vs. United States*, 168 U. S., 1; 18 Sup. Ct. Rep., 18.

*City of New Orleans vs. Citizens Bank of Louisiana*, 167 U. S., 371; 17 Sup. Ct. Rep., 905.

*Bissell vs. Spring Valley Township*, 124 U. S., 225; 8 Sup. Ct. Rep., 495.

*Nations vs. Johnson*, 24 How., 195.

*Gunter vs. Atlantic Coast Line Ry. Co.*, 200 U. S., 273; 26 Sup. Ct. Rep., 252.

*Keech vs. Beatty, et al.*, 127 Cal., 177; 59 Pac. 837.

*Bank of Santa Fe vs. Haskell County Bank*, 51 Kan., 50; 32 Pac. 627

*La Fourche vs. Terrebonne*, 40 La. Ann., 1331; 22 So., 376.

This question is so thoroughly discussed in the cases in this court, above cited, that any argument upon our part would seem entirely superfluous. Particularly in the case of the *Southern Pacific Railway Company vs. United States, supra*, this principle is reviewed by Mr. Justice Harlan at great length. He reviews all of the case on the question from almost all of the courts. In the third paragraph of the syllabus in that case, the court states the rule as follows:

"A decision on a question of title to lands is conclusive in a subsequent suit between the same parties in respect to other lands, when the lands in both suits have a common source of title, and the title depends

upon the existence or non-existence of a fact directly adjudicated in the former case."

This was a suit by the United States against the Southern Pacific Railway Company to quiet title to lands which had been formerly granted to a railroad company, and was alleged to have been forfeited to the government. The government contended that insofar as the question of the title to the land was concerned that it had been conclusively settled by the judgment in the case of the *United States vs. Southern Pacific Railway Company*, reported in the 146 U. S., at page 570. That in the latter case, the title to several large tracts of land having been settled and adjudicated, that it was conclusive as to the title of the land in question in that case, although it was different land, from the fact that the title to the same was derived from a common source, and adjudication as to the one, would necessarily determine the rights as to the other. The court sustained the contentions of the government, and as above stated, reviewed the authorities and discussed the principle at great length. Among other things, the court said:

"The general principle announced in numerous cases is that a right, question or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties

or their privies, be taken as conclusively established, so long as the judgment in the first suit remain unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them."

Also in the case of the *City of New Orleans vs. Citizens Bank of Louisiana, supra*, Mr. Justice White discusses this principle at considerable length. The question involved in this case was whether or not a judgment enjoining the collection of a tax against a bank for a particular year on the ground of a charter exemption, was conclusive as to the right to the exemption for future years, and the court held that it was.

And in the case of *Bissell vs. Spring Valley Township, supra*, the question recurred upon whether or not a judgment touching the validity of coupons to bonds issued in aid of a railroad company was final and conclusive, as to the rights of the parties on the bond itself, and the court held that it was.

Nor, is the rule changed by reason of the fact that the former judgment might have been erroneous. The court having jurisdiction of the parties and the

subject matter, its judgment is final whether erroneous or not, when unappealed from, and cannot be attacked collaterally.

In the case of the *Bank of Santa Fe vs. Haskell County Bank*, *supra*, the Supreme Court of Kansas states the rule in the syllabus as follows:

"An erroneous judgment rendered by a court having jurisdiction of the subject matter of the action, and the persons of the parties, is valid and binding until set aside or reversed."

So, in the case of *Keech vs. Beatty, et al.*, the Supreme Court of California, in paragraph 4 of the syllabus, states as follows:

"That a judgment in an action for claim and delivery may be erroneous does not render its effect as *res judicata* less binding.

Also this court in the case of *Nations, et al., vs. Johnson, et al.*, *supra*, states the rule in the following language:

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court."

We deem it unnecessary to multiply citations upon this matter, or to enter into a very lengthy discussion. This court has determined the question after a very full and thorough consideration of the same, in

the cases cited, and we believe we come squarely within that rule. Here is a sewer system, which consists of a main sewer and certain laterals or district sewers. They are built under a franchise granted by the City of Shawnee. A court having jurisdiction of the parties and the subject matter, a court exercising general jurisdiction in all matters, both in law and equity, decides and enters a judgment and decree finding that the city is concluded from building a main sewer alongside of the main sewer of the appellants; that the ordinances and contracts made by the city with it, excludes the city from entering into competition in building a main sewer, and enters a decree enjoining its so building, until compensation is made therefor. Under the rule stated by this court, that finding is also conclusive as to the laterals or district sewers, which are involved in this case. There being the one system, and the appellants deriving their powers and rights to build, operate and maintain that from one common source, and they both depending upon the same facts, the adjudication of the one necessarily carries with it the adjudication of the other. If the city is precluded from building a main sewer in competition with the main sewer of the appellants, they certainly would be concluded from building lateral or district sewers in competition with its lateral and district sewers.

We invite the court's attention to a reading of the decree and also of the pleadings in the former

case, and it will be found that the same questions identically, were presented and there determined.

If it be true then, that the adjudication in the Territorial court was conclusive as to these laterals and district sewers, and that a construction had been placed upon the ordinance granting the original right to the appellants, that the city was excluded from building in competition to it, their attempt to let a contract to the Newman Plumbing Company and pass an ordinance providing for the laying of lateral and district sewers alongside of their laterals, would be an impairment of the appellants' contract.

The respondent contended in the court below that as the franchise under which the appellant contended, did not upon its face, purport to be exclusive, that the city might at any time it saw fit, engage in the business of maintaining and operating a sanitary sewer in competition with its sewer. The complainant, however, contended, upon the other hand, that the franchise granted it by the respondent, was exclusive as against the city, for the reason that it had been construed by the Territorial court to be so, and the construction placed thereon became *res judicata*, and therefore, the action of the city, in attempting to let a contract to build a public sewer, would be impairing the obligations of the appellants' contract.

In the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S., 1, the court, in discussing this proposition, said:

"The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it."

And further on, the court, in the opinion, says:

"We think, however, that it sufficiently appears, that if the city were allowed to erect and maintain competing water works the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it the cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. \* \* \* To require the plaintiff to aver specifically how the establishment of competing water works would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge, and within the common observation of men."

The proceeding of the City of Shawnee, to vote bonds and let a contract to build and maintain a competing public sewer, would also deprive the appellants of their property, without due process of law.

*Chicago, etc., Ry. Co. vs. Chicago*, 166 U. S., 226.

*Garrison vs. New York City*, 21 Wall., 196.  
 Matter of Jacobs, 98 N. Y., 98.  
*Pennsylvania Ry. Co. vs. Angle and wife*, 41  
 N. J.; Eq. 316; 7 Atl., 432.  
*City of St. Louis vs. Dorr*, — Mo., —;  
 41 S. W., 1094.

It is not necessary that there be a physical taking of the property for public or private use, to bring it within the meaning of the due process clause of the Fourteenth Amendment. A person may be deprived of his property, without the actual physical possession being taken from him. As was said in the matter of Jacobs, *supra*:

"The constitutional guaranty that no person shall be deprived of his property without due process of law, may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence, any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

So, in the case of *Pennsylvania Railway Company vs. Angle and wife*, *supra*, the court say:

"In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they

cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells or noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense."

In this case, it is alleged in the bill that the building of a public sewer alongside of the sewer of the complainants, would render the property wholly valueless, and further alleged that as the public sewer, under the law, would be supported by taxation, and property owners would be compelled to support it whether they patronized it or not, and that it would cost them the same to patronize it as it would not to patronize it, and as a private sewer depended upon patronage for support, it would necessarily mean that its patronage would be wholly withdrawn, and as its property was underground, that it would be rendered valueless and worthless. The action of the city, therefore, ignoring its former contract, and the decree of the court, and letting the contract to build alongside of the property of the complainants, without first condemning the same or paying any compensation therefor, would be depriving it of its property without due process of law, as well as impairing the obligations of the contract between them.

## II.

On the third day of March, 1907, the parties to this controversy made a contract, which appears on pages 19 and 20 of the record, and among other things, the contract provided as follows:

"That the party of the second part, (that is the city) shall and will recognize the rights of the party of the first part, the owners of certain laterals now laid in the said city, and the said party of the second part shall, at the time the said city shall be districted into sewer districts, for the purpose of laying and constructing laterals in said sewer district, the said city shall cause said laterals of the said party of the first part, to be appraised, in case an agreement cannot be had for the value thereof, by the appointment of a commission, one to be selected by the city, one to be selected by the owner of the property to be affected, and one to be selected by the party of the first part, which said parties shall fix the price of the laterals, and said city shall then proceed, under any lawful means, to tax up the said laterals at the price agreed upon, to the abutting property, and deliver the tax warrants unto the said party of the first part, which shall be in full payment for said laterals, insofar as the abutting property is concerned. \* \* \* It is further agreed that said party of the second part shall not build any new laterals up any alley in which the laterals of the party of the first part are now situated, unless said laterals as now existing, are inadequate to accommodate connections. If said laterals belonging to the said party of the first part, cannot be used for connections, on account of being too shallow in the ground, or for any other reason, then the same shall not be considered in this agreement, and the said city shall have the right to construct other laterals belonging to the said party of the second part, or to

deepen or repair the said laterals belonging to party of the first part, at its own expense, and then proceed as above set forth."

The plaintiff further alleged in its bill that its laterals, as they existed on the date of said contract, were adequate to accommodate connections with the respondent's sewer. That the respondent had wholly failed, refused and neglected to comply with any of the terms of this contract, but in direct violation thereof, was proceeding to build new laterals alongside of the complainant's laterals, although the laterals of the complainant were adequate to accommodate connections.

The complainant, in his bill, further alleged that they had submitted a proposition offering to lower or raise any laterals that were not sufficient, if any were found to be such, which offer appears on page 20 of the record.

It appears to us that a reading of the bill in connection with this contract, remembering that its allegations shall be taken as true in considering the demurrer, will convince one at once that this demurrer ought to have been overruled.

Undoubtedly the city, in the exercise of its powers over sewers at the date this last contract was made, had a right to make that contract. It seems to have been supported by a sufficient consideration, and it appears from the allegations of the bill that in disregard of its terms, that the city was proceeding to

confiscate the complainant's property. We deem it unnecessary to cite any authorities except to refer to the ones heretofore cited, and particularly to the case of *Walla Walla vs. Walla Walla Water Company, supra*, which discusses fully all of the matters presented in this assignment.

The obligations of this contract were that the city would recognize complainant's rights in these laterals. That they would use all lawful means to purchase the same, and tax up the amount thereof to the abutting property, and that they would build no new laterals in alleys where the complainants' laterals were situated. Certainly the contract to the Newman Plumbing Company, entered into by the city, together with an ordinance calling an election to vote bonds to build a public sewer, would be impairing this obligation.

The court below decided this case primarily upon the question that the grant of the franchise, and the making of the contract referred to, on behalf of the city, was an attempt to barter away the legislative power of police; that this power being one that remained constantly under the control of legislative authority, that the city council could not bind itself nor its successors, to contracts which were prejudicial to the peace, good order, health or morals of its inhabitants, but in deciding this proposition, the court wholly overlooked the material allegations of the bill in this behalf, which alleged that the said sewer sys-

tem was adequate to meet the demands and necessities of the city of Shawnee, and all and every part thereof, and further that if it was inadequate that the complainants offered to make them adequate. Paragraph 7 of the bill, on page 4, appears the following allegations:

"And is now, and has been continuously since the said time, maintaining the said sewer system, and has met all the demands and necessities of the said city of Shawnee for sewerage purposes, and has in all respects carried out the terms and conditions of the said ordinance granting it the franchise, privileges and immunities as above stated, and has connected with the city hall, jail, fire department and public watering trough, etc."

In paragraph 8 on page 5 of the bill, appears the following:

"And so constructed the said system of sewerage adequate to all the needs, comforts and demands of the said city of Shawnee."

Also in paragraph 18, the matter is stated as follows:

"Although such laterals are now and were on the 31<sup>st</sup> day of March, 1907, adequate to accommodate connections with the defendant's main sewer, and if the same are inadequate, your orator has offered to and now offers to make them adequate."

And paragraph 20, is as follows:

"Your orator further shows to your Honors, that the said laterals owned by it, are as aforesaid, in

every way, adequate to accommodate connections with the defendant's main sewer; that they are in every way sufficient and adequate, but that defendant has refused to carry out the terms of the said contract and all and every part thereof, for the purpose of confiscating the property of your orator and appropriating the same, without due process of law."

There is no doubt but what if the sewer system maintained by the complainants was inadequate to meet the demands and necessities of the city of Shawnee, that the city could compel them to make the same adequate, or forfeit their franchise, but from this case it appears conclusively that this system was adequate to meet all the demands and comforts of the city.

As said by this court, in the case of *Walla Walla vs. Walla Walla Water Company, supra*:

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined. If a contract be objectionable in itself, upon these grounds, or if it becomes so in its execution, the municipality may, in the exercise of its police power, regulate the manner

in which it may be carried out, or may abrogate it entirely \* \* \* Under this power and the analogous power of taxation, we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances, respecting the manner in which the pipes and mains of the company should be laid through the streets of the city \* \* \* But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

This identical question was presented in the Walla Walla case, and disposed of contrary to the contentions of the appellee. Under the familiar rule that by a demurrer the respondent admits the allegations of the bill to be true, it appears in this case that this system of the complainants' sewer was amply sufficient, and was accommodating all of the necessities and demands of the city. Therefore, in the language of this court, "the aid of police power cannot be invoked to abrogate or impair it."

#### CONCLUSION.

In conclusion we desire to say that we confidently believe that this demurrer ought to be overruled, and the evidence taken on the plaintiff's bill. That the judgment of the Territorial court is *res judicata*, as to the rights of the parties in the laterals,

out of which this controversy arises, and that the contract referred to is valid and binding, and cannot be impaired by a resort to police power.

We have not presented any great number of cases, for the reason that the few cases that we have cited seem to decide all of the questions presented in this appeal. Particularly the case of Walla Walla seems to discuss practically all of the questions involved herein.

We therefore submit that for the reasons assigned and discussed, this cause ought to be reversed.

Respectfully submitted,

B. B. BLAKENEY AND  
JAMES H. MAXEY,

*Attorneys for Appellant*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1910.

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THE SHAWNEE SEWERAGE AND  
DRAINAGE COMPANY,

*Appellant,*

vs.

F. P. STEARNS, AS MAYOR OF THE  
CITY OF SHAWNEE, ET AL.,

*Appellees.*

No. 109

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**BRIEF OF APPELLEES.**

The original franchise granted to the Shawnee Sewerage and Drainage Company was not exclusive, and not being in terms exclusive, gives no rights to the company as against the right of the city to build and equip its own sewer, is shown by such an array of authorities that we need only cite the following:

*Knoxville Water Company vs. Knoxville*, 200 U. S., 22.

*Helena Water Works Company vs. Helena*,  
122 Fed., 14.

195 U. S., 383; *Joplin vs. Southwest Missouri  
Light Co.*

191 U. S., 157; 48 L. Ed. 130; *Freeport  
Water Company vs. Freeport*, 180 U. S.  
587; 45 L. Ed., 679.

It is also true that the impairment of the value of the appellant's plant, even its confiscation by the competition of municipal ownership will not exclude the city from the right to build its own plant. In the case above cited of the *Knoxville Water Company vs. Knoxville*, the court said:

"It may be that the erection and maintenance of gas works by the city at public expense, and in competition with the complainant, will ultimately impair if not destroy, the value of the plaintiffs' works, for the purpose for which they were established. But such considerations cannot control the determination of the legal rights of parties. As was said by this court in *Curtis vs. Whitney*, 13 Wallace, 68, 'nor does every statute which affects the value of a contract, impair its obligation.'"

In the case of *Joplin vs. The Southwest Missouri Light Company*, *supra*, Mr. Justice McKenna quotes with approval the language of Mr. Justice Peckham, in *Skaneateles Water Company vs. Skaneateles*, 184 U. S., 354; 46 L. Ed. 585, as follows:

"There is no implied contract in an ordinary grant of a franchise such as this, that the grantor will never do any act by which the value of the franchise granted

in the future may be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of litigation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

It follows from the authorities then, that impairment of value has nothing to do with the question involved. But it is insisted that the judgment in the Territorial court is *res adjudicata*, which taken in connection with the contract attempted to be entered into by the Shawnee Sewerage & Drainage Company, and the committee of the council, is binding on the city and excludes the city from extending the laterals in competition with the company.

The argument of the appellant is made under two assignments of error, first, that the injunction granted in the territorial court was *res judicata*, and second, "that the contract entered into between the appellant and the appellees on the third day of March, 1907, was a valid, binding and subsisting contract between the appellant and the appellees, and the ordinance granting the franchise to its assignors constituted a binding contract between them, and that the letting of a new contract to the Newman Plumbing Company, passing an ordinance providing for the erection of a public sewer to be owned and operated by the appellees, impaired the appellant's said contracts, and each one of them."

Answering the second argument first, we contend that as to the pretended contract set out in the record

marked Exhibit "E" (page 19 of record) that any violation upon the part of the city, even admitting that said contract was valid, which we do not concede, would raise no federal question, as there was no law of the state, or ordinance of the city, passed after said contract was made, but the said contract was made in view of the law of the state and the ordinance of the city, which had been by the decree of the court held valid and binding.

We contend however, that the contract between the Sewer Company and the Committee of the Council, upon which reliance is placed is: first, *ultra vires*, for the reason that the city was powerless under the law to enter into any such contract. The contract provides that, should the city elect to purchase the lateral sewers of the company, that it would endeavor to make an assessment against abutting property to pay for it, and the price to be fixed by arbitrators, one to be chosen by the company, one by the city, one by the owners of each lot to be assessed. This is the method provided by the contract to fix the value of the sewer, and then the city obligates itself to apportion this amount among the several lots purported to be benefited by the sewers, and tax the lot for its portion of the cost. The sewer company accepted this arrangement for its pay, and this is the only method prescribed in the contract for paying the sewer company. The question is, first, can this contract be enforced, and second, if it can, is a failure on the part

of the city to comply with the provisions thereof, a violation of any provision of the constitution or laws of the United States?

As to the first question, we submit that the contract is absolutely void and cannot be enforced, for the reason that there is no legal provision in the contract by which the sewer company can receive any pay.

Prior to the year 1907, there was no law directly providing for the construction of sewers in cities of the first class, but in the year 1897 the territorial legislature passed an Act providing that cities of the first class might provide for the construction of lateral sewers at the cost of the city, and empowered the city to levy a special assessment on all lots abutting on such sewers, and to apportion such levy to the various lots according to the actual cost of the labor and material expended in the construction of such, along the lots assessed, and further provided, that such assessments should be made and collected in the manner provided for the levying and collecting of special assessments in other cases (Session Laws 1897, Chapter 6, Article 3).

This law of course meant that the city should own the sewers. Next came the act of Congress passed in 1898, giving cities of over one thousand population, the power to vote bonds to construct sewers; this also meant, and could only mean, that the city should own the sewers. But in 1901, the mayor and council of Shawnee passed an ordinance granting to the sewer

company a franchise, or rather a license, to construct a sewer system in Shawnee. Then came the act of the territorial legislature in 1903 providing further for public and private sewers, and further provided that, when the mayor and council shall deem a district sewer necessary, they shall cause to be prepared sections, profiles and specifications for such work, together with a complete estimate, and they shall adopt any material or methods for the construction of sewers according to the plans prepared, and then shall advertise for bids and let the contract to the lowest responsible bidder, but in no case shall the contract price exceed the estimated cost submitted with the plans and specifications, and the mayor and council may reject any and all bids. It further provides that as soon as the sewers are completed the city engineer shall compute the whole cost thereof, which shall include all other expenses of the city besides the contract price for the work, and shall apportion the same against all the lots and shall report to the mayor and council who shall thereupon levy a special tax by ordinance against the lot, and if the same be not paid, the mayor and council may issue a tax warrant against each lot. This then, is the only method provided by the legislature by which cities can make assessments against private property to pay for district sewers. The contract upon which the sewer company seeks to maintain this action further provides; that the city does not attempt to bind

itself any further than warranted and permitted by law.

Now we contend that this contract is contrary to law, hence void, and cannot be enforced. A municipal corporation cannot make any contract to assess or levy a tax on private property for public improvements, unless the power is delegated to it by the legislature, and the manner for making such assessment must be strictly followed by the city, or the levy is void.

Beach on Pub. Corp. Section 1166.

Municipal authorities cannot levy an assessment for an improvement without express legislative permission.

*Vaughn vs. City of Ashland* (Wis.) 37 N. W. 809.

Beach on Municipal Corporations, Section 1166.

And the language of the statute conferring the authority must be strictly construed and confined to cases already within its scope.

Beach on Corp., Section 1166.

It is a settled rule that statutes granting municipal corporations power which involves the imposition of burdens on private property are to be strictly construed; and where such statutes require the doing of some particular thing in its nature jurisdictional as a

condition precedent to the right to impose such burden, that failure to do the thing required will render the whole proceeding void.

Beach Mun. Corp. Section 1125.  
*Mason vs. Fearson*, 9 Howard, 130.

The manner in which proceedings shall be instituted and conducted is generally specifically provided by charter or statute, and courts are strict in enforcing all legal provisions thereof.

McQuillan Munc. Corp., page 829;  
*Gray vs. Burr* (Cal.) 70 Pacific, 1068.

A contract made by a municipal corporation in contravention of express law, is void, and the corporation cannot be held liable therefor.

Vol. 1, Beach Public Corp. Sections 217-244;  
*County of Davis vs. Dickinson*, 117 U. S. 657.

Unless the Act of the territorial legislature, passed in 1903 impairs the obligation of the contract or franchise granted by the city to the sewer company of 1901 to construct a sewer system in Shawnee, this court has no jurisdiction. Anything that the city might do tending to impair or repudiate its contract with the sewer company, unless it was done after and by virtue of a law passed by the legislature, would not be a violation of Section 10, Article 1, of the Constitution of the

United States, providing that no state shall pass any law impairing the obligation of contracts.

Neither the territorial nor state legislature has passed any law impairing any obligation of the sewer contract between the company and the city, and if the city has done, or is doing anything to impair that obligation, redress should be sought in the state courts. Now can the sewer company say that the city should not be allowed to construct lateral sewers in the vicinity of its lateral sewers for the reason that, at the time the city passed the ordinance granting to it the privilege of constructing a sewer system, to-wit: 1901, there were two acts, one by the legislature of the territory, and one by congress, both of which gave cities power to vote bonds for the construction of sewers, to be owned by the city.

These laws were in force at the time the city granted to the sewer company the right to construct its sewer. The sewer company accepted this grant from the city with full knowledge of the existence of these laws, and knew that under these laws, the city had the right, whenever it deemed it necessary for the preservation of the health of the inhabitants of the city to construct a system of sewers of its own.

With this reserved power to cities to construct and own sewers, in the statutes of both the United States and the territory of Oklahoma, the city, whenever it deemed it necessary, could construct a sewer system of its own, and in so doing, would not impair the obliga-

tion of the contract it had with the sewer company even though the property of the company would be rendered worthless. Nor can a city bind itself by any contract divesting or abridging its full control to do anything for the protection of the public health, and nothing will protect the public health of a city more effectually, than sanitary sewers.

*National Water Works Company vs. City of Kansas*, 28 Fed. 921;

*Butchers Union, Cons. vs. Crescent City Company*, 4th S. C. R., 658.

Nor can a city grant to a corporation an exclusive franchise without express authority from the legislature, even where no express prohibition is found in its charter or statutes.

McQuillan Munc. Ordinances, Section 190;  
*Greenville Water Works Company vs. City of Greenville*, 4th So. Rep 409.

The power of municipal corporations are limited by the express terms of the grant, and will not be extended by inference. They can confer exclusive privileges only under an express grant of power from the legislature.

But coming to the first assignment of error, and the contention raised by appellant that the decision of the territorial court, was *res judicata*. What was the object of the suit in the territorial court? An examination of the petition will show that it was a suit to

declare the bond election illegal, and the ordinance directing it illegal, not because it impaired the obligation of their contract under a law of the state, but for certain defects in the ordinance itself; and further to enjoin the issuance of the bonds, and from "doing any act or thing tending to depreciate the properties of said plaintiff," and from "doing or performing any act or thing towards the construction of any sewerage system in the said city of Shawnee under city ownership and control."

When the decree was made, instead of declaring the ordinance invalid, the court declared it valid; instead of declaring the election invalid, the court declared it valid; instead of enjoining the issue of the bonds, the court validated them; and the only finding of fact in favor of the company was that, it

"had a legal franchise for carrying on the business of operating a sewer system in the city of Shawnee, and that the construction and operation of a sewer system in the City of Shawnee in the immediate vicinity of said sewer would confiscate the plaintiff's property and depreciate the value of the bonds thereon."

And said decree provided that: "It is further adjudged and decreed that the mayor and councilmen of the City of Shawnee, be and they are hereby enjoined from building or providing a sewerage system in the vicinity of the plaintiff, said sewer main as herein described until after plaintiff's said sewer main shall be condemned or purchased by the City of Shawnee." (Record p. 45).

It is admitted in appellant's brief (p. 10), that

thereafter, the appellant sold its main sewer to the city, so it will be seen that the city was only enjoined from "building or providing a sewerage system in the vicinity of the plaintiff's said sewer main," "until after plaintiff's said sewer main shall be condemned or purchased by the city."

The question as to the right of the city to construct the lateral sewers was not litigated or determined in that action.

A former judgment is not conclusive in another action between the same parties upon a different claim or demand, except, as to the point or question actually litigated and determined in the former action.

*Roberts vs. The Northern Pacific Railroad Company*, 158 U. S. 1, 29 Law. Ed. 873.  
*Cromwell vs. Sac. County*, 94 U. S. 352.

In the above case of *Roberts vs. The Northern Pacific Railroad*, Mr. Justice Shiras in delivering the opinion of this court quoted with approval the language of this court in the above case of *Cromwell vs. Sac. County*, as follows:

"This distinction was clearly recognized in the case of *Cromwell vs. Sac. County*, 94 U. S. 352. That was a case where there was brought into question the effect, as between the same parties, of a former judgment holding invalid coupons taken from the same bond with those in a second suit, and it was there said: 'In considering the operation of this judgment it should be borne in mind that there is a difference between the effect of a judgment as a bar or estoppel against the

prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon its merits, constitutes an absolute bar to subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and of the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases therefore, where it sought to apply the estoppel of a judgment rendered upon one

cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not as to what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of judgments mentioned is seen through all the leading adjudications upon the doctrine of estoppel.

'The cases usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined.' 'It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction.'

And said:

"It was accordingly held in that case that a party plaintiff who had been defeated in one action upon coupons cut from county bonds because he failed to show that he was a bona fide holder for value, was not precluded from showing, in a subsequent action brought to recover on other coupons cut from the same bonds, that he was such bona fide holder for value of such other coupons."

The injunction in the territorial court went only to two matters, first, "the mayor and councilmen of the City of Shawnee be and they are hereby enjoined from building or providing a sewer system in the vicinity of the plaintiff's said sewer main, as herein described, until after plaintiff's said sewer main shall be condemned or purchased by the City of Shawnee;" and second, they were enjoined from "preventing the said plaintiff from connecting with main sewer free of charge, and to use the same by such connections, all the district sewers and laterals belonging to the plaintiff in operation within said city at the date of the rendition of this judgment."

It is alleged in the bill and admitted in appellant's brief (p. 10) that on March 3, 1907, the city purchased the main sewer of the appellant company at the sum of Six Thousand Nine Hundred Dollars; by the very language of the injunction in the Territorial Court this purchase terminated the operation of the same, and the city was no longer bound thereby.

The city could not divest itself of the power to provide for the protection of the lives, health, and property of the citizens, and the preservation of good order and public morals. All rights, including those under charters, are held subject to the police power of the state.

*C. B. & Q. Ry. vs. Omaha*, 170 U. S., 57; 18 S. C. R. 513;  
*Stone vs. Mississippi*, 101 U. S., 814; 25 L. Ed. 1079;  
*Boston Beer Co. vs. Mississippi*, 97 U. S., 25; 24 L. Ed. 989;  
*Butcher's Union Company vs. Crescent City Co.* 111 U. S., 746;  
*City of Portland vs. Myers*, 52 Pac., 21; 28 Fed. 921, *supra*.

In the case last above cited the City of Kansas City had granted to the Water Works Company under a law which admittedly gave them the power to do so, the right to lay water mains in the street for a system of water works. Afterwards the city in establishing a system of sewers, compelled the water company to relay its water pipes at its own expense, and the water company brought suit against the city for the cost of such removal, and the defendant city set up the contention—"that it could not, if it would, and it did not if it could, contract to waive the right to construct sewers in any part of the public streets it might deem necessary; and that the plaintiff took its contract right to lay its pipe in the public streets subject to the para-

mount and inalienable right of the city to construct its sewers wherever therein, in its judgment, the public interests demanded."

In passing on this contention, Mr Justice Brewer said:

"I think the contention of the city is correct, Sewerage is a matter unquestionably affecting largely the public health, and no municipality can make a contract divesting or abridging its full control over such matters."

The judgment of the circuit sustaining the demurrer to the bill should be sustained.

Respectfully submitted,

J. H. EVEREST,

*Attorney for Appellees.*

J. H. Woods,

W. M. ENGART,

*Of Counsel.*

SHAWNEE SEWERAGE AND DRAINAGE COMPANY *v.* STEARNS, AS MAYOR OF THE CITY OF SHAWNEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 109. Submitted March 14, 1911.—Decided April 10, 1911.

A simple breach of a contract by a municipality does not amount to an act impairing the obligation of the contract.

A statute authorizing the issuing of bonds for the purpose of constructing a public utility cannot impair the obligation of a contract made subsequent to the enactment of such statute.

The breach of a contract is neither confiscation of property nor the taking of property without due process of law. *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 145.

Where diversity of citizenship does not exist and plaintiff's claim is based on a simple breach of contract by a municipality, the case is not one arising under the contract or due process clause of the Constitution, and the Circuit Court has not jurisdiction.

Where the Circuit Court dismisses a bill on the merits, but it appears that jurisdiction did not exist, the decree must be reversed and the cause remanded with instructions to dismiss for want of jurisdiction. *McGilvra v. Ross*, 215 U. S. 70.

THE facts, which involve the jurisdiction of the Circuit Court of cases arising under the Constitution and laws of the United States, are stated in the opinion.

*Mr. B. B. Blakeney and Mr. James H. Maxey* for appellant.

220 U. S.

Opinion of the Court.

*Mr. J. H. Everest, Mr. J. H. Woods and Mr. W. M. Engart* for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

It is contended that this case involves the construction or application of the Constitution of the United States, and that therefore the appeal has been taken directly to this court from the Circuit Court.

The appellant, we shall call it the Drainage Company, is a corporation organized under the laws of Oklahoma; the appellees are the mayor, clerk and the members of the city council of the city of Shawnee, a municipal corporation. The Walter Newman Plumbing Company and Walter Newman are also appellees.

A summary of the facts as presented by the bill is as follows: The city of Shawnee, a city of the first class under the laws of the Territory of Oklahoma, granted by an ordinance (No. 228) to De Bruler-Newman & Company, their successors and assigns, the right, for the period of fifty years, to build and maintain a system of sewerage, with the necessary branches and appurtenances essential to the same, "along certain lines" in the city. It was provided that the city should have the right to purchase the system at the expiration of a period of fifteen years, at the exact cost of its construction. And further, that if the city did not desire to make the purchase the ordinance should run for fifty years. There was a time fixed for the commencement and completion of the system.

The ordinance was amended by a subsequent ordinance (No. 241) by making the term of the right twenty-one years and ratifying all the other provisions of the first ordinance.

On the first of February, 1902, De Bruler-Newman & Company assigned their rights under the ordinance to the

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Drainage Company. The assignment was ratified by the city by an ordinance (No. 242) passed February 26, 1902, and the Drainage Company authorized to mortgage the rights and properties in a sum not exceeding \$25,000.00. The ordinance also provided that the city should have the right to purchase the system at the exact cost of its construction or any extension of it after the expiration of fifteen years.

De Bruler-Newman & Company commenced and continued the construction of the system until the assignment to the Drainage Company as above stated, and after the assignment the Drainage Company conducted its construction "and extended its mains and laterals over and throughout the limits" of the city and expended and invested therein \$40,000.00, and issued its bonds and notes in pursuance of ordinance No. 242 and secured the sum by a mortgage on the property and franchises. The company performed its duties to the city, met all of the demands for sewerage purposes, and carried out the terms and conditions of the ordinance until the twenty-second of December, 1906, at which time it sold and transferred its main line to the city. The company is the owner of the rest of the property which is of the value of \$30,000.00 and which is regularly assessed and pays to the city its just property taxes.

On the first of December, 1901, the city passed an ordinance providing that wherever the system was extended "all over ground closets should be declared a public nuisance," but after the company had extended the system the ordinance was repealed, and the city has habitually and systematically discouraged, and by divers means has attempted, to impair the investment of the company.

On the sixth of November, 1906, after certain proceedings had, a question was submitted to the voters of the city whether bonds should be issued in the sum \$165,000.00 for the construction of a sewer system, which was duly

carried. The Drainage Company then commenced a suit in the District Court of the county to enjoin the city from constructing and maintaining a sewer system in the city without having purchased the company's system or compensated it therefor, which suit was regularly tried and a decree rendered that the company had a legal and valid franchise, and that it "was authorized by such franchise to carry on the business of operating the said system of sewerage," and that the construction and operation of a sewer system by the city in the immediate vicinity of the company's system would confiscate its property and depreciate the value of the bonds thereon. The city was enjoined from constructing its system until the company's main sewer should be condemned or purchased by it, and, in the event that it should condemn or purchase the main sewer, the mayor and councilmen were enjoined from preventing the company "from connecting with any main sewer of the said defendant (the city) free of charge and to use the same by such connection with the district sewers and laterals" belonging to the company in operation at the date of the rendition of the decree.

The legality of the election at which bonds were authorized to be issued by the city to the amount of \$165,000.00 was adjudged.

Subsequent to this decree, to-wit, on the third of March, 1907, the company and the city entered into a contract, Exhibit E, by which the company sold to the city all of its main line of sewer for the consideration of \$6,900.00, it being provided that the city would recognize the company's rights to the laterals which were then laid in the city, and which were of the value of \$30,000.00.

It was further provided that at such time as the city should be divided into sewer districts for the purpose of laying and constructing laterals in the districts, the city would cause the property of the company to be appraised by a commission, in case agreement could not be had as to

the price thereof. The price being fixed, the city was to "use all lawful means to tax up said laterals, at the price agreed upon to the abutting property, and deliver the tax warrants to the" company, which should "be in full payment for such laterals, in so far as the abutting property" was concerned. It was provided that the city should not be liable for the payment of the warrants, and that it did "not attempt to bind itself any further than warranted and permitted by law."

On the first day of June, 1908, the company, in order to comply with the contract above referred to, submitted to the city a proposition offering to relay and lower all of the laterals owned by it, to the depth required by the plans and specifications and under the directions of the city engineer and at his estimated cost, if any of the same were not of such depth, which offer was refused. The city, in disregard of the judgment in favor of the company and of the contract with it above referred to, entered into a contract with the Newman Plumbing Company (one of the appellees), by which the latter was granted a contract to lay the laterals necessary and desired by the city, "and in the vicinity and in the same streets and alleys which are now occupied by the laterals" of the company, and, unless enjoined, will proceed with the performance of the contract, and if it be performed the city will cause its citizens to connect with the laterals, because it must tax to build and maintain them, "and no other or further consideration would be required," and the citizens whose property is connected with the company's system would be taxed to maintain the system, whether connected with it or not, and its property, which is now of the value of \$30,000.00, being wholly underground, would be worthless. The company is ready and willing to carry out its contract above referred to, (Exhibit E), and the citizens of the several sewer districts, are willing that their property be taxed as provided, but that the city, in disregard of the

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contract, allowed the Newman Plumbing Company to build new, separate and independent laterals in the sewer districts.

The contract of March 3, 1907, between the company and the city was made in consideration of the city recognizing the rights of the company and the performance by the city of the matters agreed to be performed by it, which it has not done, "but for the purpose of confiscating" the company's "property and rendering it worthless and valueless, and in total disregard of its contract," has let the contract, as above mentioned, to the Newman Plumbing Company, although the laterals of the company "were, on the third day of March, 1907, adequate to accommodate connection" with the city's main sewer, and if the same are inadequate the company has offered and offers to make them adequate.

The city has refused to carry out the contract for the purpose of confiscating the company's property and of appropriating the same without due process of law, and that the contract with the Newman Company is void, as it impairs the obligation of the contract of the city with the company and is a confiscation of the company's property.

The city has attempted to assess the cost of the laterals laid by it upon the abutting property owners and the property of the company for the purpose of damaging the company and for no other purpose.

The contract (Exhibit E) was made by the city under the authority of an act of Congress, being the same under which the bonds for \$165,000, above referred to, were issued, and its contract was in all respects legal and valid, and the company is entitled to have it enforced and the defendants (appellees) enjoined from violating it.

The company has no adequate remedy at law and is entitled to an injunction against violating the rights of the company, as set forth in the bill, and to have a mandatory

injunction, requiring the city "to conform to said contract and said decree." The prayer of the bill is that the city be enjoined from constructing laterals where the company's laterals "are situated and were situated on the third of March, 1907, and from doing or performing anything that tends to appropriate the property" of the company "without due compensation, or does impair the obligations of the contract of the parties, or deprive" the company "of its property without due process of law." General relief is also prayed.

There was a plea to the jurisdiction, stating as ground thereof, among others, that the allegations of the bill did not present a case of the violation of the Constitution of the United States. A demurrer to the bill was also filed, repeating the ground stated in the plea and setting forth the further ground that the Drainage Company had "a full, complete and adequate remedy at law." The bill was subsequently amended by alleging specifically that the amount involved was more than \$2,000; and a temporary injunction was granted.

A general demurrer was filed to the amended bill for want of equity, which was sustained, and the temporary injunction dissolved and the bill dismissed.

No opinion was filed in the case, and the grounds upon which the demurrer was sustained we can only collect from the order allowing an appeal directly to this court and from the assignments of error. By the latter the action of the court is attacked as deciding that the ordinance of the city granting the right to the Drainage Company to occupy the streets of the city "with its laterals, mains and connections," the decree of the District Court mentioned in the bill and the subsequent contract between the company and the city did not impair the obligations of the contract with the company, in violation of the provisions of the Constitution of the United States, and that the action of the city in tearing up the mains and

laterals of the company was not a confiscation of its property without due process of law.

These assignments, therefore, present the question for our decision, and it is these that counsel have discussed in their briefs. Appellant refers to the plea filed to the jurisdiction of the Circuit Court as follows: "The respondent (appellee) presented a plea to the jurisdiction of the court, . . . which plea was by the court duly overruled, but which question will probably be presented in this court."

To sustain the jurisdiction appellant advances the propositions, (1) that the city had the power to pass the ordinance by which it granted to appellant's predecessor and to appellant the franchise to construct a sewer system; (2) that the original franchise constituted a contract between the company and the city, and that this contract had been construed and adjudicated by the District Court of the Territory of Oklahoma as being exclusive and as prohibiting the city from building and maintaining a public sewer; (3) that the subsequent contract with regard to laterals was a valid contract, and that the contract with the Newman Plumbing Company to build a public sewer, as set out in the bill, impaired its obligation and appropriated and deprived the company of its property without due process of law. All these propositions, it is said, present Federal questions.

It is manifest that the stress of the case is upon the contract mentioned in the third proposition. The rights conferred by the ordinance were exercised for four years, and no interference with them is asserted except by the bond election of November 6, 1906. The purpose of the suit in the District Court of the Territory was to restrain the issue of the bonds on the ground that two-thirds of the voters had not voted for the same, and that the building of a public sewer system would affect and impair the rights of the company, much in the same way as detailed in the

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bill in this case. There was no allegation of the impairment of the contract constituted by the ordinance. But it was alleged that the bond election was illegal and that under the laws of the Territory and the act of Congress applicable thereto the city had no power to construct a sewer system of its own under the circumstances detailed, and no authority under the law to in any manner destroy value of the company's property, or to confiscate the same, and to deprive the company of its vested rights and interests by virtue of the ordinance without just compensation.

It was prayed that the city be enjoined from issuing the bonds or causing a levy to be made upon the property of the company, or from doing anything which would tend to depreciate the property of the company.

It was decreed, as we have seen, that the Drainage Company had a legal franchise to build a sewer system, and that the construction by the city of a system in the immediate vicinity of the company's would confiscate its property and depreciate the value of the bonds thereof. But the bond election was declared legal, and that under the act of Congress of March 4, 1898, the city ought to issue the bonds as directed for the construction of sewers, among other purposes. The city, however, was enjoined from building or providing a sewerage system in the vicinity of that of the company until after it should purchase or condemn such system. It was further adjudged that in the event the city should condemn or purchase the main sewer of the company, it be enjoined from preventing the company from connecting with the main sewer free of charge, and to use the same by such connections for all district sewers and laterals belonging to the company in operation at the date of the rendition of the decree.

The rights of the parties as fixed by this litigation are clear. The company was adjudged to have a franchise to operate a sewer system and that under the franchise the company, "among other things, constructed a main

sewer" from and to certain points, "together with certain manholes, connections and bulkheads." It was valued at \$6,900.00. The city's right to build a system was adjudged, but it was enjoined from building in the vicinity of that of the company. Its right to purchase or condemn the latter was recognized, but it was decreed that until such right should be exercised the city was enjoined from preventing the company from connecting all of its district sewers and laterals with the main sewer.

The rights of the parties thus being fixed by the decree, they entered into a contract in March, 1907, by which the city purchased the main sewer of the company and agreed to take over the laterals of the company in the way we have pointed out, to be paid by tax warrants, the city not binding itself for the payment in any way.

The city, it is alleged, has not attempted to comply with the contract, but, on the contrary, has made a contract with the Newman Plumbing Company to lay the laterals it desires. A simple breach of contract is, therefore, alleged on the part of the city. We are pointed to no law impairing the obligation of the contract. The statute under which the bonds were authorized to be issued is not such a law. It was passed before the contract was made. The breach of a contract is neither a confiscation of property nor a taking of property without due process of law. The case, therefore, comes within the principles announced in *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 145.

It is clear, therefore, that on the face of the bill the Circuit Court had no jurisdiction of the suit, there being no diversity of citizenship, and no real and substantial question arising under the Constitution of the United States being presented by the bill.

The bill was dismissed by the Circuit Court apparently on the merits. It should have been dismissed for want of jurisdiction. The decree, therefore, must be reversed

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and the cause remanded to the Circuit Court with directions to sustain the demurrer for want of jurisdiction, and on that ground dismiss the bill. *McGilvra v. Ross*, 215 U. S. 70, 80.

*So ordered.*

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